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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Opinions Below.

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Eighth Circuit affirming the judgment of conviction is reported at 123 F. (2d) 715 (R. 1-5). Its opinion accompanying its order that the Government answer the application of the petitioner for a rehearing is reported at 124 F. (2d) 849 (R. 9-10). Its opinion denying such application is reported at 126 F. (2d) 462 (R. 30-32).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347. The petitioner's

application to the court below for a rehearing was denied March 25, 1942 (R. 30). The petition for writ of certiorari was filed April 21, 1942. The writ of certiorari was granted June 8, 1942 (R. 32).

Statement of the Case.

In the United States District Court for the Western District of Arkansas the petitioner was convicted of kidnapping in violation of 18 U. S. C. A. §408a. The person allegedly kidnapped was the illegitimate daughter of the petitioner's wife (R. 1).

At the trial the petitioner, represented by counsel appointed by the court, contended both that he had not taken or detained the daughter against her will (R. 13) and that he came within the exception of the statute which states that it does not apply to a kidnapping, "in the case of a minor, by a parent thereof" (R. 2). In brief on appeal, *in forma pauperis*, the only error urged by his counsel was the refusal of the trial judge to submit to the jury the question whether the daughter was a minor at the time of the alleged kidnapping and to instruct the jury that if she was a minor the petitioner should be acquitted (R. 2). On this point the Circuit Court of Appeals held that the word "parent" means one who, if not a blood parent, at least stands *in loco parentis*, and that the record disclosed no fact tending to establish the relation of parent and child at the time of the offense. While there was dispute whether, at the time of the alleged kidnapping, the daughter was over eighteen, she had, prior to that time, lived in the petitioner's household only for a brief period when she was an infant and at the time of the alleged kidnapping she had been married for about three years and was living with her husband (R. 1-2).

The Circuit Court of Appeals pointed out that the ap-

peal presented only the one question, and affirmed the judgment. 123 F. (2d) 715, 716, 718 (R. 2, 5).[1]

Thereupon the petitioner filed with the Circuit Court of Appeals, in person and not through counsel, a "Petition for Rehearing and Writ of Certiorari", asking that the trial court be directed "to have prepared at government expense, a full and complete record of all the testimony given in the case", and to forward the record to the Circuit Court of Appeals "for review and reconsideration" (R. 5). In support of this application the petitioner set forth facts as to the purport of the evidence at his trial indicating that the evidence would not sustain the conviction (R. 5-8).

The Circuit Court of Appeals, after stating that if the petitioner's statement of the case were true he was wrongfully convicted (R. 9), ordered that the Attorney General and the United States Attorney for the Western District of Arkansas be supplied with copies of the petitioner's application, that they answer it, and that the petitioner be afforded an opportunity to reply to their answer (R. 10). In entering this order the Court stated that ordinarily a decision of the only question originally presented on the appeal would end the case, but that, in view of the Supreme Court's action " 'on the Government's consent' " in *Holmes v. United States*, 314 U. S. 583 (1941), it seemed advisable to give the Government an opportunity to state its position respecting the petitioner's application so that, if it desired to consent to a reopening, "it may do so here, without subjecting the appellant to the unnecessary burden in such a situation of having to petition for certiorari, before the consent is granted". 124 F. (2d) 849 (R. 9-10).

The Government, by the United States Attorney, filed an answer refusing to consent to a reopening. It stated:

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[1] Each of the Court's subsequent opinions likewise emphasized that the only question presented to it upon the record was that relating to the petitioner's parenthood.

(a) In this case the official court reporter reported the entire proceedings at the trial (*cf.* R. 38) so that a "transcript of the record was available to the appellant", whereas in the *Holmes* case only parts of the testimony had been taken down in shorthand and the Government consented to vacate the judgment after the case came to the Supreme Court only because it then was discovered for the first time that a bill of exceptions could be prepared (R. 12-13).

(b) The Government, under a ruling of the Comptroller General, 9 Comp. Gen. 503 (1930), is without authority to pay the cost of a transcript of testimony for an indigent defendant (R. 13).

(c) The petitioner had a fair trial and was found guilty upon substantial evidence (R. 13-14).

(d) The official court reporter who took down the testimony was the secretary to the trial judge. Under rulings of the Comptroller General it is not legal for the Government to pay a court reporter for a transcript if the reporter draws a salary as secretary to a District Judge, "* * * and the Court Reporter cannot be required to furnish a transcript of the evidence to the Government under these circumstances". Moreover it would be unreasonable to ask the reporter to furnish a transcript of the seven days' proceedings in this case and in view of the amount of other business pending in the District Court it would take the reporter "several months" to furnish it (R. 14).

(e) The petitioner's counsel was of the opinion that there was substantial evidence of the petitioner's guilt and therefore decided not to seek appellate review of the sufficiency of the evidence to sustain the conviction. The petitioner had able counsel; the petitioner was allowed to proceed *in forma pauperis* with no limitation on the number of

witnesses he was permitted to call at Government expense; and the case was fully investigated and fairly tried. In these circumstances the petitioner should be bound by the decision of his counsel not to seek appellate review on the ground in question (R. 14-16).

To this answer the petitioner filed a reply stating, among other things:

(a) In a criminal case, charging a capital offense, an indigent defendant should be furnished, without cost to him, with a transcript of evidence in order to make up the record on appeal—at least an appellate court should have power to require the furnishing of such a transcript in aid of its appellate jurisdiction to determine whether "justice has been done" (R. 21-22).

(b) The Government paid the reporter in this case for his work of recording the testimony in shorthand,[1] the notes should therefore be in the custody of the clerk of the trial court "available to that clerk to prepare and make certified copies of," in order that the appellate court may determine whether justice has been done, and there is nothing in the *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836, preventing such action (R. 22).

(c) The petitioner, having no funds, is unable himself to pay the reporter to have the shorthand notes transcribed (R. 23).

(d) The petitioner's counsel informed him immediately after the verdict that they "were positive they could show

[1] The petitioner doubtless meant that he had not engaged the reporter to record the testimony and had not fully paid for this service. While performing this service the reporter was paid his regular salary as secretary to the trial judge. Appendix A indicates that in connection with the appeal the petitioner did pay the reporter something for his services in recording the testimony.

the Circuit Court of Appeals that the 'Evidence did not support the verdict'" if the petitioner could raise the money to have the testimony transcribed. The petitioner many times pleaded with his counsel to appeal on the ground of the insufficiency of the evidence, but each time they informed him that such an appeal was impossible because of his inability to purchase a transcript (R. 24-25).

Thereupon the Circuit Court of Appeals entered an order denying the petitioner's application. In its opinion the Court referred to the fact that the Government "seeks to distinguish" the *Holmes* case, states that it cannot lawfully pay for the transcript and that the petitioner had the opportunity to secure a complete record, and will not consent to a reopening. The Court concluded:

> "Whether there is a distinction between the Holmes case and the present case, we do not regard as important. What we were concerned about was whether the Government proposed to consent to a vacation of the judgment of this Court in this case and to a reconsideration and rehearing. This Court has decided the only question which was presented and which, upon the record, it had jurisdiction to decide, and we are convinced that it decided that question correctly. The only judgment which could have been entered was entered, and the case is ended so far as this Court is concerned. If further proceedings are to be conducted by the appellant, they must necessarily be conducted in the Supreme Court of the United States. We are, therefore, of the opinion that the appellant, if he intends to proceed further, should apply to that Court for such relief and assistance as he may consider himself entitled to."

Finally the Circuit Court of Appeals granted the petitioner leave to institute further proceedings in this Court without payment of fees or costs in the Circuit Court of Appeals. 126 F. (2d) 462 (R. 30-32).

In addition to the foregoing facts, certain additional events should be kept in mind in deciding this case.

On February 12, 1941, immediately after the verdict and sentence, a notice of appeal was filed in the trial court setting forth as grounds of appeal:

> "(1) That the court erred in refusing defendant's prayer for a *peremptory* instruction of not guilty, both at the conclusion of the Government's case and at the conclusion of all the evidence in the case. (2) That the court erred in admitting the testimony of Government witnesses whose names were not included in the list furnished to defendant two days before the trial. (3) That the court erred in refusing defendant's prayer for an instruction to the effect that if the jury found that complaining witness was under the age of eighteen years at the time of the kidnapping, they must find the defendant not guilty under 18 U. S. Code 408 (a). (4) That the verdict of the jury was contrary to the weight of the evidence" (R. 34).

This notice was signed by the petitioner's counsel and presumably a copy was duly transmitted to the Circuit Court of Appeals as required by Rule 4 of the *Rules of Criminal Procedure after Verdict.*

The same grounds of appeal were stated in the "Application for Appeal in Forma Pauperis" filed in the trial court on February 11, 1941, signed by the petitioner himself [1] (R. 33). This application was granted by the trial court on February 13, 1941 (R. 35).

The petitioner's counsel filed an assignment of errors in the trial court on March 10, 1941. This assignment,

[1] The petitioner also filed such an application in the Circuit Court of Appeals dated February 17, 1941, which set forth the same grounds of appeal. The record filed in this Court shows that this application was granted on March 3, 1941 (R. 35), but does not set forth this application. However, at the request of the petitioner's counsel the Clerk of this Court secured a copy thereof from the Clerk of the Circuit Court of Appeals and furnished it to counsel.

specifically recited only the error involved in the trial court's refusal to adopt the petitioner's contention that the petitioner would not be guilty if the person kidnapped was a minor, since the petitioner was her "parent". There was, however, a general prayer for reversal on account of this error and "other manifest errors" in the record, and a prayer "for such further orders • • • as are mete and proper in the premises" (R. 36-37).

The bill of exceptions, settled by the trial court in an order referring to it as agreed upon by the parties (R. 39), sets forth only so much of the transcript of testimony as would bear on the petitioner's alleged parenthood and the minority of the person allegedly kidnapped—the bill of exceptions does, however, show that there was a motion for a directed verdict, on the ground of the insufficiency of the evidence to prove guilt, both at the close of the Government's case (R. 37), and at the close of the whole case (R. 38).

The record does not show whether the trial court was made aware of the petitioner's desire for a record of all the evidence except insofar as the notice of appeal and the *in forma pauperis* plea set forth as grounds of appeal that the court should have granted the motion for a directed verdict and that the evidence did not sustain the verdict. To the extent that a complete record of the evidence is necessary to support these grounds of appeal, the trial court was on notice of the petitioner's desire. The petitioner also wrote the trial judge a personal letter, apparently received by the judge on April 18, 1941 (R. 27), which the petitioner describes "as a motion requesting him to set aside the sentence" (R. 24).[1] The judge thereupon did reduce the peti-

[1] Present counsel has tried to secure a copy of this letter. That there was such a letter is indicated not only by the petitioner's statement but also by the fact that it was referred to by the petitioner's former counsel in a letter to the petitioner telling him of the judge's action in reducing

tioner's sentence from seven to five years (R. 6, 24; *cf.* R. 16).

The Solicitor General's Memorandum in Opposition to the Granting of the Petition for Writ of Certiorari points out (at p. 4, n. 1) that the brief filed by the petitioner's counsel in the Circuit Court of Appeals stated that the petitioner would have assigned as error and contended that the verdict was not sustained by the evidence if he had been able to pay the reporter for transcribing the testimony so that it might be incorporated in the bill of exceptions. See *infra*, pp. 13, 14.

While the record does not definitely disclose the fact, it is understood that the petitioner was in jail at least from the time of his conviction, and that, on February 25, 1941, as a result of electing to commence the service of his sentence, he was committed to the federal penitentiary at Leavenworth, where he is now incarcerated.

Summary of the Facts.

In summary, then, the case is this: A pauper defendant, in custody, desired to have appellate review of the question whether his conviction was sustained by the evidence. He pleaded with his counsel, who had been appointed to defend him, to present this issue. The issue was presented in the notice of appeal. But his counsel, despite their opinion that the issue was meritorious, informed him that they could not pursue the issue unless he could pay the official court reporter for transcribing the notes of the testimony. He could not do so and his counsel, for that reason, limited the bill of exceptions and the brief before the Circuit Court

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his sentence after receiving the letter (R. 27-28; see also Appendix A. hereto). However the petitioner has informed his present counsel that he does not have a copy of the letter, and the secretary to the trial judge has written present counsel stating that he cannot find this letter in the judge's files.

of Appeals to other issues. After that Court's decision on such other issues, he personally, and not through counsel, petitioned that Court to reopen his case and to have a complete record of all the evidence furnished, without cost to him, for the purpose of review to determine its sufficiency to sustain the verdict. The Government refused to consent to a reopening. The Circuit Court of Appeals then denied the petition to reopen on the sole ground that it had no jurisdiction, without the Government's consent, to deal with any question other than the one presented in the bill of exceptions.

Summary of Argument.

I. A Circuit Court of Appeals has jurisdiction upon the filing of a notice of appeal to take whatever action may be appropriate to assure that a defendant has been justly treated, regardless of the scope of the bill of exceptions.

II. The petitioner has not waived his right to a record adequately presenting the issues of which he desires appellate review. Even if a transcript could not be furnished him without cost, he had a right to have a record made up in some other way. It was the responsibility of the lower courts, the district attorney and the counsel appointed to represent him to see to it that he secured a record. The petitioner himself asserted his rights as fully as could be expected.

III. The trial court had the power to furnish the petitioner with a transcript of testimony without cost to him. The power to afford such assistance to an indigent defendant in a criminal case is inherent in a trial court and no Act of Congress has destroyed it. Moreover, Congress has granted, or recognized, the power to afford such assistance in the *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836. And not only is the appropriation for miscellaneous

expenses of the United States courts generally available to meet the cost of such a transcript, but there is now a specific item in that appropriation for this very purpose. Public No. 644, 77th Cong., 2d sess., c. 472, Title IV; UNITED STATES CODE CONGRESSIONAL SERVICE, No. 7, p. 752 (1942).

IV. Even if the courts generally have no power to aid the indigent by furnishing a transcript without cost, this case should be remanded with instructions to the trial court requiring the preparation of a bill of exceptions on the issues of which the petitioner desires appellate review. Since the secretary to the trial judge took the shorthand notes of the testimony and, in view of rulings of the Comptroller General, could not legally be paid either by the Government or the petitioner for transcribing them, the most appropriate course in this particular case would be for the trial judge to order his secretary to make a transcription from which the bill of exceptions could be made up.

V. Whether or not it is necessary to a decision of this case to determine whether a transcript may be furnished to a pauper without cost to him, it is desirable that this Court announce the correct view of the matter in order that further erroneous rulings of lower courts may be avoided. It is time that the practice in United States courts be brought into line with prevailing conceptions of responsibility toward the poor.

ARGUMENT.

I.

The Circuit Court of Appeals Had Jurisdiction to Pass on the Merits of the Petitioner's "Petition for Rehearing".

The Circuit Court of Appeals erred in holding that it had no jurisdiction to pass on the merits of the "Petition for Rehearing".

The notice of appeal included as grounds of appeal the points of which the "Petition for Rehearing" sought appellate review. Thereupon, under Rule 4 of the *Rules of Criminal Procedure after Verdict*, the Circuit Court of Appeals had full power at any time to take any necessary action to assure a proper record and just treatment of the petitioner. *Ray* v. *United States*, 301 U. S. 158 (1937); *Forte* v. *United States*, 302 U. S. 220 (1937); *Kay* v. *United States*, 303 U. S. 1 (1938); *Ross* v. *United States*, 102 F. (2d) 113 (C. C. A. 9, 1939); *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C., 1941). Even though the appellate court is confronted with no contention respecting the inadequacy of the record until a petition for rehearing, its jurisdiction remains unimpaired. This is demonstrated by the *Forte* case, where this Court held:

> "In this instance, had the question been raised *in limine*, the Court of Appeals would have had power to determine what the interests of justice required and it lost none of that power by reason of the fact that the question was not brought to its attention until the court had heard argument and reached a decision upon the assumption that the bill of exceptions was properly before it." 302 U. S. at 223-224.

II.

The Petitioner's Right to an Adequate Record Has Not Been Waived.

Nor can it be held that the petitioner has waived his right to a record reflecting the issues stated in his notice of appeal.

The Government's answer to the petitioner's "Petition for Rehearing" asserted that the petitioner's counsel failed to pursue the issue that the evidence did not support the verdict because of their belief that the point was insubstantial. However, as we shall see, this statement was not

accurate. In any event, for the purpose of this proceeding, the petitioner's own statement of the facts must be taken to be true. *Cf. Cochran* v. *Kansas*, 316 U. S. 255, 257 (1942).

The petitioner's reply to the Government's answer shows that his counsel assured him that the appellate court would reverse on the ground that the verdict was not supported by the evidence; that the petitioner many times "pleaded with his attorneys" to raise the question but that they did not do so; and that they informed him that it was impossible for them to do so because of his inability to pay for a transcript of the testimony (R. 24-25). The verity of these statements is borne out by letters to the petitioner from his attorneys written during the summer of 1941, and attached to his reply to the Government's answer (R. 28-29). And a letter from the same counsel to the petitioner's present counsel, appearing in Appendix A hereto,[1] further confirms the fact. Moreover the petitioner's counsel, in the brief before the Circuit Court of Appeals, stated:[2]

> "After conviction and sentence, the Appellant filed his notice of appeal, setting out several grounds therefor, among (them) being that the verdict of the jury was contrary to the law and the evidence and was not supported by the evidence. Unfortunately, the poverty of Appellant precludes him from presenting that point to this Court because he was unable to raise funds sufficient to pay the Court stenographer for transcribing

[1] The petitioner's former counsel has given present counsel permission to submit this letter to this Court.

[2] This statement in the brief on behalf of the petitioner is referred to at p. 4, n. 1, of the Solicitor General's *Memorandum in Opposition to the Granting of the Petition for Writ of Certiorari*. The Solicitor General has a copy of the brief and the Clerk of the Circuit Court of Appeals has sent present counsel for the petitioner one of the copies filed in that court. The statement quoted appears at p. 2 of the brief. Later in the same brief, at p. 21, after referring to the fact that the jury found that the petitioner had kidnapped the complaining witness, the petitioner's counsel stated:

> "As the Appellant has been unable to challenge the correctness of this finding, he must argue, during this appeal, on the assumption that such finding was correct."

all of the voluminous testimony so that it might be incorporated into his bill of exceptions. It is only fair to say, however, that the evidence adduced by the Government on the point of the actual kidnapping was very slight. Appellant concedes, however, that under the circumstances he must forego the urging of the possible incorrectness of the Jury's findings."

Thus it is perfectly clear that the petitioner's counsel refrained from pressing the grounds of appeal in accordance with the petitioner's desires only because of their belief that the petitioner's inability to purchase a transcript made it impossible, and not because of a belief that the case lacked merit.

So far as the petitioner himself is concerned, he did not sleep on his rights. He pleaded with his counsel repeatedly to pursue the appeal on the ground that the evidence did not sustain the verdict (R. 25). When informed that his inability to buy a transcript made this impossible, he sought to present affidavits to the appellate court on the question whether he kidnapped his wife's daughter. (R. 29; see also Appendix A hereto.) He urged his counsel to argue in their brief the question of the sufficiency of the evidence. (See Appendix A hereto.) He wrote the trial judge a letter "as a motion requesting him to set aside the sentence" (R. 24).[1] More could hardly be expected of a poverty stricken and ignorant[2] cotton picker, deprived of his liberty, with counsel assigned to represent him.

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[1] See *supra*, p. 8, n. 1.

[2] The petitioner's education and knowledge of legal rights are not accurately reflected by the literacy and ability displayed in his papers filed with the Circuit Court of Appeals and with this Court. Despite the fact that these papers were filed over his own name they were obviously prepared by someone else. A more accurate picture of the petitioner is given by two of his letters to the trial judge, one written just after his conviction, while he was in jail, and the other written several weeks later, from Leavenworth. Copies of these letters were sent to present counsel by the secretary to the trial judge at the direction of the trial judge, and are set forth in Appendix B hereto.

Whether or not the petitioner was entitled to a transcript of the testimony without cost to him, he was entitled to a bill of exceptions which would set forth the evidence in the case. No rule requires that the evidence be set forth in transcript form. Even the express requirement of Rule 75(b) of the *Rules of Civil Procedure*, that where a civil trial is stenographically reported the appellant must supply a copy of the reporter's transcript gives way to a pauper; he may present a record in some other form. *Hall v. Gordon*, 119 F. (2d) 463 (App. D. C., 1941); *Middleton v. Hartford Accident & Indemnity Co.*, 119 F. (2d) 721 (C. C. A. 5, 1941).

Someone, the petitioner's counsel, the district attorney, or the trial court, should have seen to it that the petitioner's rights were protected.

The notice of appeal put the trial court on notice of the petitioner's desire to have appellate review of the sufficiency of the evidence to sustain the verdict. Moreover the one document that had to be signed by the petitioner personally, his petition to proceed on appeal *in forma pauperis*, filed with and granted by the trial court, disclosed this ground of appeal.

Rule 7 of the *Rules of Criminal Procedure after Verdict* provides:

> "The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, *including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.* * * *" (emphasis supplied).

This Rule places an affirmative duty on the trial court. The extent of this duty is emphasized by the very different

provision in the Rule applicable to civil cases. Rule 75 (a) of the *Rules of Civil Procedure* provides:

> "Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal."

The contrast between the civil Rule and the criminal Rule is striking. Whereas in civil cases the initiative is with the appellant, in criminal cases, under Rule 7, initiative is placed on the trial judge. As one court has recently said with specific reference to this Rule:

> "The initiative in many of these matters, especially in those relating to preparation of the record, is placed upon the judge or the clerk of the trial court." *Boykin* v. *Huff*, 121 F. (2d) 865, 873 (App. D. C., 1941).

The duty of a trial court to issue the proper directions under this Rule becomes particularly important where the defendant is charged with a heinous crime, where he has been represented by counsel whom the court itself has appointed, and where he is both a pauper and ignorant. The court's responsibility in such circumstances cannot be discharged simply by appointing counsel. See *infra*, p. 19.

The present record does not disclose what, if anything, was done by the trial court under Rule 7. But it seems apparent that if anything had been done it would have immediately disclosed to the court the petitioner's plight. Not only his counsel, but the district attorney as well, knew of the situation, for the former had consulted the latter, along with the court reporter who was the trial judge's secretary, concerning the availability of a transcript. (See Appendix A hereto.) And it should be as much the duty of the district attorney as of the petitioner's counsel, in a case of this kind, to see to it that the trial court is fully

informed and that proper steps are taken to protect the rights of a pauper. As this Court said in *Berger* v. *United States*, 295 U. S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

See also *Griffin* v. *United States*, 295 Fed. 437, 439 (C. C. A. 3, 1924); *State* v. *Osborne*, 54 Ore. 289, 296, 103 Pac. 62, 65 (1909).

It would, of course, have been a simple matter to have seen to it that the record which the petitioner's appeal called for was properly prepared. The trial court's own secretary was available to testify from his notes concerning the evidence. In fact, in the absence of a court reporter it would have been the trial court's responsibility, by making such notes as might be necessary, to retain a clear recollection of what transpired at the trial for the purpose of settling a bill of exceptions. As the court said in *In re Bills of Exceptions*, 37 F. (2d) 849, 851 (C. C. A. 6, 1930):

> "Settling a bill of exceptions is inherently and historically the personal act of the trial judge. Originally it was done, either as to each ruling at the time the ruling was made, or very soon after the trial. It depended upon the memory of the trial judge, as aided by his notes * * * but the settling continues to be the personal act of the trial judge, depending upon his memory and such aids as there may be."

Where his own secretary took down everything in shorthand there is no reason that the judge himself could not

have ordered his secretary to transcribe the notes, or substantial parts of them, in order to secure the record to which the petitioner was entitled.

In other words, all that was needed here, to protect the petitioner, was a minimum of cooperation between the trial court, his own secretary, the district attorney, and the petitioner's counsel.

In the Circuit Court of Appeals, too, there was oversight of the petitioner's rights. There, as in the trial court, he filed, on February 17, 1941, a petition to proceed *in forma pauperis*, signed by himself personally, which disclosed the ground of appeal he wished to urge.[1] There, too, a copy of his notice of appeal was filed. Rule 4 of the *Rules of Criminal Procedure after Verdict*. Finally his counsel's brief explained, in terms, that the only reason for the failure to present a bill of exceptions adequate to the grounds of appeal was the petitioner's inability to buy a transcript. *Supra*, p. 13. While his counsel did not argue the case in person (R. 28),[2] a simple inquiry from that court would have disclosed the situation and led to prompt steps either there or through orders to the trial court to secure a bill of exceptions.

With these failures to protect him on the part of the agencies of justice, it is difficult to see how the petitioner could have been more diligent in asserting his rights. A defendant of much more education and sophistication in *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C., 1941), was even less diligent but was finally given redress. There, after conviction of pandering, a defendant had filed a notice of appeal, in the form of a personal letter to the trial judge. The judge, in ensuing correspondence with him, failed to make it clear that the defendant could appeal *in propria*

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[1] See *supra*, p. 7, n. 1.

[2] The petitioner's former counsel has written present counsel confirming the fact that no one argued the case in the petitioner's behalf.

persona, leaving the defendant with the impression that he had to secure counsel. Apparently he was unable to do so. In any event he did nothing toward perfecting and prosecuting an appeal. Two years or more later, on review of a decision denying his petition for writ of habeas corpus, the appellate court held that the remedy by appeal remained available and that the appellate court would see to it that his right to appeal would be assured. The defendant in that case, as his letters, quoted in the court's opinion, show, was extremely literate and knew that he had a constitutional right to have counsel or to represent himself—yet his failure to prosecute his appeal for some years did not forfeit his right to an appropriate bill of exceptions.

Appointed counsel is an agency of the court.

> "By the common law, prisoners indicted for felonious crimes were not allowed counsel before juries, but only before the court on questions of law, the judge taking upon himself theoretically the management of his defense in court during the progress of the trial. Here the court have power to assign counsel to perform the service they would otherwise feel bound to take upon themselves. He is thus a sort of substitute for themselves, and his omissions should be viewed by the court, in the exercise of its discretion in granting or refusing new trials, more favorably than if he had been employed by the prisoner himself for his defense." *State* v. *Williams,* 9 Houst. 508, 528, 18 A. 949, 951 (Dela., 1890); *cf. People* v. *Blevins,* 251 Ill. 381, 390, 96 N. E. 214, 218 (1911).

In a very real sense, therefore, when the petitioner's counsel informed the petitioner that it was impossible to present a question on appeal because of his inability to buy a transcript, it was as though the court itself had so informed him. In any case, the rule that a client is bound by his attorney's decisions as applied in a civil case, *Sutherland* v. *Round,* 57 Fed. 467 (C.C.A. 6, 1893), must be applied very

differently in a criminal case, *Hannon* v. *United States*, 99 F. (2d) 933 (C.C.A. 3, 1938); *People* v. *Nowak*, 372 Ill. 381, 24 N. E. (2d) 50 (1939); *People* v. *Gardiner*, 303 Ill. 204, 135 N. E. 422 (1922); *People* v. *Schulman*, 299 Ill. 125, 132 N. E. 530 (1921), and where a capital crime is charged, with counsel appointed by the court because of the defendant's poverty, special care must be taken to assure that every right of the defendant is fully protected despite any waiver or neglect of those rights by his counsel. *Johnson* v. *United States*, 110 F. (2d) 562 (App. D. C., 1940).

III.

The Trial Court Had Power to Furnish a Transcript of Testimony, in Order to Make up a Record, Without Cost to the Petitioner.

A. *A Trial Court Has Inherent Power to Provide Such Assistance to a Pauper Defendant in a Criminal Case.*

1. In Forma Pauperis Relief is Not Dependent upon Statutory Provision Therefor

The books contain abundant recognition of the inherent power of a court to afford *in forma pauperis* relief entirely apart from any statutory provision therefor.

The statute of 11 Henry VII, c. 12, 4 Great Britain Statutes at Large (Cambridge ed. 1763) 60 (1494), was the first legislation in England on the subject of *in forma pauperis* relief; it provided that plaintiffs might sue civilly without payment for writs and that attorneys might be assigned to serve without fee.[1] This statute, however, has been held to be merely declaratory of the pre-existing common law. *Brunt* v. *Wardle*, 3 Man. & G. 534, 133 Eng.

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[1] The statute of 23 Henry VIII, c. 15, 4 Great Britain Statutes at Large (Cambridge Ed. 1763) 244 (1531), relieved paupers of costs.

Rep. (full reprint) 1254 (1841); *Martin* v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917); *Majors* v. *Superior Court*, 181 Cal. 270, 184 Pac. 18 (1919); Note, *Proceedings in Forma Pauperis*, 31 HARV. L. REV. 485 (1918); Note, *Forma Pauperis Suits in California*, 27 Cal. L. Rev. 352 (1939); Annotation, 6 A. L. R. 1281. There is other very respectable evidence that long before Henry VII's Parliament took the foregoing action, English courts found means, without benefit of statute, for providing justice to the poor. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363 *et seq.* (1923); I Pollock and Maitland, HISTORY OF ENGLISH LAW 195 (2d ed., 1898). And, though Parliament had limited its statute to the common law courts, equity, ecclesiastical and probate courts have provided their own *in forma pauperis* relief. Maguire, *op. cit. supra*, at pp. 365 *et seq.*; Annotation, L. R. A. 1918 B, 319, 320. Moreover, while Parliament had not referred to appeals, in *Bland* v. *Lamb*, 2 Jac. & W. 399, 402, 37 Eng. Rep. (full reprint) 680, 681 (1820), Lord Eldon is reported to have said, in a civil case involving the construction of a will,

> "• • • it was a very singular proposition that a pauper could not appeal. He could not see why, because a party was poor, the Court should not set itself right."

Whatever may be the law with respect to civil litigation, there is the clearest possible ruling by Lord Hardwick in *Rex* v. *Wright*, Cas. T. Hard, 253, 95 Eng. Rep. (full reprint) 162 (1736), respecting a court's inherent power to extend *in forma pauperis* relief in a criminal case. There a motion for permission to defend as a pauper an indictment for conspiracy was first denied. Cas. T. Hard. 211, 95 Eng. Rep. (full reprint) 136. At the next term, however, the motion was renewed and ten instances were cited

in which this relief had been granted. In the course of a careful examination of the question Lord Hardwick said:

> "Now when this matter was first moved, and it was taken to arise upon the statute of (11) Hen. VII (c. 12), there appeared to me to be no manner of ground for it, and (without doubt there is no ground for it) upon that statute; but now it is put upon another foundation, that it has been the course of the Court to admit defendants in forma pauperis, and if it has been so, it ought to be adhered to. Though there are no late precedents, yet those produced seem to be extremely strong, that the Court has a discretionary power to do it." Cas. T. Hard, 254, 95 Eng. Rep. (full reprint) 163.

That this continued to be the practice at common law is demonstrated by such cases as *Brunt* v. *Wardle*, 3 Man. & G. 534, 544, 133 Eng. Rep. (full reprint) 1254, 1258 (1841), where Maule, J., said:

> "The statute of 11 H. 7 does not, in terms, extend to criminal proceedings; and yet it has been the practice of the Court of Queens Bench to admit parties to defend indictments in forma pauperis, which could only be done by action of its common law authority."

In the United States, likewise, there has been a very general—though not unanimous—recognition of a court's power, quite apart from statute, to grant *in forma pauperis* relief.

Martin v. *Superior Court*, 176 Cal. 289, 168 Pac. 135 (1917), contains one of the more thorough opinions on the subject. There, the plaintiff in a tort case sought to proceed *in forma pauperis*. There was no *in forma pauperis* statute. The defendant therefore urged that fees had to be paid, and argued that the early English *in forma pauperis* statutes had not been received as a part of the common law. The court rejected the latter argument, but then went on to hold:

"But, quite independently of this determination, there is still the controlling fact that the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find, since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing, and yet this is precisely the position which respondents to this application take." 168 Pac. at p. 137.

After a review of the English decisions, and after pointing out historical mistakes in certain American decisions holding that *in forma pauperis* relief depended upon statute, the court went on to hold that its power to grant the relief sought existed apart from any statute and that the legislature, in general statutes requiring the payment of fees, had not negatived the court's inherent power to aid a pauper. The court said,

"Quite aside from the question as to the power of the legislature to do this thing, it is obvious that only the plainest declaration of legislative intent would be construed as even an effort to do this thing. We find no such expressed intent. All of the statutes dealing with the payment and prepayment of fees . . . are general in their nature, and have to do with the orderly collection and disposition of the fees, payment or prepayment of which is prescribed by law. Neither individually nor collectively are they even susceptible of the construction that the design of the legislature was

to deny to the courts *the exercise of their most just and most necessary inherent power.*" 168 Pac. at. p. 138 (emphasis supplied.)

The foregoing decision was reaffirmed, with a further historical review, in *Majors* v. *Superior Court*, 181 Cal. 270, 184 Pac. 18 (1919). A variety of other cases adopt a similar view in both state [1] and federal [2] courts.

For our purpose, cases of particular interest are those dealing with the inherent power of a court to provide justice to a pauper in a criminal case without cost to him. Among the more pertinent is *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940). Certain earlier Indiana decisions had stated that at common law a court could not grant *in forma pauperis* relief to plaintiffs in civil cases. *Hoey* v. *McCarthy*, 124 Ind. 464, 466, 24 N. E. 1038 (1890): *Harrison* v. *Stanton*, 146 Ind. 366, 371, 45 N. E. 582, 583 (1896). Nonetheless in a criminal case, the Indiana court held that an attorney could be assigned to defend a pauper, regardless of statute. But then, faced

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[1] *Hickey* v. *Rhine*, 16 Tex. 576 (1856), plaintiff allowed to proceed in civil case without security for costs; *In re Morgan*, 122 Ind. 428, 432, 23 N. E. 863, 864 (1889), in proper case court can require transcript for criminal defendant at public expense; *State ex rel. Coella* v. *Fennimore*, 2 Wash. 370, 26 Pac. 807 (1891), criminal defendant granted transcript of record at public expense; *Lewis* v. *Smith*, 21 R. I. 324, 43 A. 542 (1899), plaintiff allowed to proceed at law without security for costs upon showing of probable cause of action since plaintiff had already shown unavailing efforts to obtain surety; *Northup* v. *Peacedale Mfg. Co.*, 25 R. I. 503, 56 A. 685 (1903), plaintiff allowed to proceed by his next friend without giving security for costs when next friend also unable to give such security; *Willis* v. *Willis*, 20 Pa. Dist. 720 (1911) non-resident plaintiff allowed to sue in trover without security for costs; *Jeffries* v. *State*, 9 Okla. Cr. 573, 132 Pac. 823 (1913), criminal defendant granted transcript of the record at public expense; *State* v. *Klein*, 95 Conn. 451, 112 A. 524 (1920), defendant in criminal case allowed transcript of evidence and printing of record on appeal at public expense. *cf. State* v. *Morgan*, 152 Ore. 1, 4, 48 Pac. (2d) 766, 767 (1935).

[2] *Bradford* v. *Bradford*, 3 Fed. Cas. 1129 (C. C. W. D. Tenn., 1878), plaintiff allowed to proceed at law *in forma pauperis*; *Ferguson* v. *Dent*,

with a unique rule in Indiana that an attorney cannot be compelled to serve without compensation, the court held that, as a matter of inherent power, it could require that the county pay the attorney for his services. In a very full review, the court pointed out that the judiciary must have the power to do what is necessary to discharge its functions, that in a criminal case this must include the power to see that a pauper is defended, and that the legislative branch cannot interfere with this power even by attempting to deny the funds to meet necessary expenses. The court said:

> "The Constitution of this state vests the judicial power in the courts. The judiciary is an independent and equal coordinate branch of the government. Courts were established for the purpose of administering justice judicially, and it has been said that their powers are coequal with their duties. In other words, they have inherent power to do everything that is necessary to carry out the purpose of their creation. • • •
>
> "It seems to be the universal rule that 'a court has the inherent power and authority to incur and order paid all such expenses as are necessary for the holding

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15 Fed. 771 (C. C. W. D. Tenn., 1883), indigent minor allowed to defend in equity *in forma pauperis* through his guardian. But *cf. Roy* v. *Louisville etc. R. Co.*, 34 Fed. 276 (C. C. W. D. Tenn., 1888), indigent minor denied permission to proceed at law as plaintiff *in forma pauperis* through his next friend—on the theory that if his next friend was without means a substitute could be supplied by the court with sufficient means; and *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7, 1904), criminal defendant denied right to appeal *in forma pauperis*. *Forma pauperis* relief was available in admiralty as a matter of inherent power of the court. *The Great Britain*, 10 Fed. Cas. 1050 (S. D. N. Y., 1843), seaman's libel for wages; *The Arctic*, 1 Fed. Cas. 1089 (E. D. Mich., 1871), seaman's libel for wages; *Berhaus* v. *Georgeanna*, 31 Fed. 405 (S. D. N. Y., 1887), seaman's libel, apparently for wages; *Lowndes* v. *The Phoenix*, 36 Fed. 272 (D. S. Car., 1888), seaman's libel for personal injuries. The decision of the Comptroller of the Treasury at 1 Comp. Dec. 29 (1894) reflects a practice in the lower federal courts of affording *forma pauperis* relief to criminal defendants to the extent even of printing a record on appeal despite absence of statutory provision therefor.

of court and the administration of its duties'. 14 American Jurisprudence, § 171, p. 371. • • •

"The conclusion seems unavoidable that it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that attorneys cannot be compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council." 29 N. E. (2d) at pp. 407-408, 413.

Compare *Board of Commissioners of Howard County* v. *Pollard*, 153 Ind. 371, 55 N. E. 87 (1899).

The fact of the matter is that State courts have held that, without statutory authority therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript, for the purpose of his appeal, at public expense. *State* v. *Klein*, 95 Conn. 451, 112 Atl. 524 (1920); *Jeffries* v. *State*, 9 Okla Cr. 573, 132 Pac. 823 (1913); see *In re Morgan*, 122 Ind. 428, 432, 23 N. E. 863, 864 (1890); *cf. State ex rel. Parmenter* v. *District Court of Ravalli County*, 111 Mont. 453, 455, 110 P. (2d) 971, 972 (1941). Indeed, even where a state statute has expressly provided that the appellant must pay for the printing of the record, a court has insisted upon carving out an exception so that, where, in the opinion of the trial court, the circumstances justify, an indigent defendant in a criminal case will be furnished with a transcript and a printed record at public expense. *State* v. *Klein, supra.*

2. The Decisions of this Court Have Recognized the Inherent Power to Aid Paupers in a Criminal Case, Including the Power to Provide a Transcript without Cost.

Decisions of this Court have accorded with the authorities just reviewed. A brief reference to two statutes will aid an analysis of these decisions.

Legislative action for relief of poor persons in criminal proceedings in United States courts began with the Act of August 8, 1846, c. xcviii, § 11, 9 Stat. 74, which became R. S. § 878, and is now carried at 28 U. S. C. A. § 656. This section provides that where a criminal defendant makes affidavit that he is unable to pay the fees necessary to secure the attendance of certain witnesses vital to his defense, the court may order such witnesses subpoenaed and the cost incurred for process and fees shall be paid in the same manner that similar costs and fees are paid in the case of witnesses subpoenaed on behalf of the United States. In the Act of July 20, 1892, c. 209, 27 Stat. 252, Congress first dealt with the indigent in civil cases. This Act, as amended and extended to include criminal cases now appears as 28 U. S. C. A. §§ 832-836. As first adopted, it provided that pauper plaintiffs might commence and prosecute their actions without the prepayment of fees and costs and without giving security therefor. See *infra*, p. 34.

These were the only two federal statutes giving relief to paupers prior to 1910. However, this Court asserted a very considerable inherent power, apart from statute, to assure protection, at Government expense, of a person charged with a crime.

In *United States* v. *Barber*, 140 U. S. 164 (1891), this Court held that a commissioner of a circuit court might recover from the United States for his fees for the administration of oaths for sureties and the jurats thereto, in connection with bail for defendants in criminal

cases. The Court said that while bail or recognizance is primarily for the benefit of the defendant, and the costs therefor in a civil case must be paid by the interested party, a criminal case is another matter. The interest of the public in securing the criminal defendant's liberty on bail is such as to make the charge against the Government a proper one.

At the same time the Court decided *United States* v. *Van Duzee*, 140 U. S. 169 (1891). There it held that although R. S. §1033, which provided for furnishing a defendant with a copy of the indictment without cost to him, was limited to capital cases, a court might, in its discretion, require that a copy be furnished in a non-capital case at the expense of the Government. After pointing out that neither the Sixth Amendment nor any statute required that the accused be informed of the accusation against him "at the expense of the government," this Court said:

> "We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government; and, when such order is made, the clerk is entitled to his fee for the copy." 140 U. S. at 173.

Then, after the adoption of the Act of 1892, applicable, as we have seen, only to civil cases, this Court decided *United States* v. *Gildersleeve*, 193 U. S. 528 (1904). In that case it appeared that a defendant, having been convicted of a criminal conspiracy and desiring to prosecute an appeal, filed a praecipe with the clerk requesting that the transcript of the entire record be prepared to consist of the pleadings, exhibits, record entries, and the testimony in connection with the trial and also the transcription of all the stenographers' minutes. The clerk estimated the cost of such a record at approximately $400.00. Thereupon the defendant filed a plea with the district judge stating

the cost of such a record as estimated by the clerk and pointing out that he was without funds to meet this cost. The plea requested the district judge to direct the clerk to prepare the record at Government expense. The district judge, without reference to any statute, granted the plea and issued an order to the clerk to prepare the transcript as requested in the praecipe.[1] The transcript was duly prepared and the case certified for appeal.

Thereafter the clerk made his claim against the United States for the cost of preparing this transcript. The clerk's account in this amount was disallowed by the accounting officers of the Treasury Department and in due time the clerk brought an action in the Court of Claims to recover the cost of preparing this transcript. The Court of Claims rendered judgment in favor of the clerk and the United States brought the case to this Court.

The Government's position was that R. S. § 878, *supra*, p. 27, was the exclusive definition of the Government's liability to aid an indigent criminal defendant and that other costs connected with his defense could not be paid by the United States. But this Court held:

> "Section 878 was originally enacted in 1846, and should not be held to operate as a prohibition to the extent contended. *The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty*, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation." 193 U. S. at 530 (emphasis supplied).

Thus by 1904, this Court had allowed, at Government expense, and without statutory provision therefor, a number

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[1] Certified copies of the praecipe, plea, and order appear in the record of the *Gildersleeve* case in the Court of Claims. This record is now lodged in the National Archives. Reference to this record is helpful to a full statement of the case.

of aids to criminal defendants,[1] including the very thing which the petitioner in the present case seeks. The question then is whether any barrier to such assistance has been erected since that time.

The opinion in the *Gildersleeve* case was rendered for a unanimous court by Chief Justice Fuller. Eight months later, in an opinion by the same Justice, also for a unanimous court, this Court decided that the Act of 1892, *supra*, p. 27, did not apply to a proceeding in an appellate court on writ of error in a civil case, but applied only to proceedings in a court of original jurisdiction, and also that an appellate court has no power in the absence of statutory provision therefor to waive the payment of costs on appeal, which are "the creatures of statute". *Bradford* v. *Southern Railway Co.*, 195 U. S. 243 (1904).[2]

The opinion in the *Bradford* case does not mention the *Gildersleeve* case, or the *Barber* or *Van Duzee* cases. *Supra*, pp. 27, 28. It is hardly conceivable that it was intended to overrule these cases, particularly in view of the fact that the *Gildersleeve* decision had been rendered so recently. Hence it must be concluded that, although this Court was denying any inherent power to waive costs in an appellate court in a civil case, the prior decisions respecting the power to aid a criminal defendant were meant to be left undisturbed.[3]

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[1] In addition to the cases in this Court, as we have seen *supra*, p. 25, n. in 1894 the Comptrolleer of the Treasury ruled that, despite the absence of statutory provision therefor, the expense of printing the record upon appeal by an indigent defendant in a criminal case could properly be charged against the appropriation for "Miscellaneous Expenses, United States Courts". 1 Comp. Dec. 29.

[2] See also *Gallaway* v. *Fort Worth Bank*, 186 U. S. 177 (1902); *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45 (1915); *cf. Ex parte Abdu*, 247 U. S. 27, 30 (1918).

[3] While the Court's opinion quotes from *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7, 1904), a criminal case, the passage quoted relates only to the conclusion that the Act of 1892 does not apply to appellate proceedings.

Whether or not it is valid to apply a rule of strict construction of a court's powers, statutory or inherent, to give *in forma pauperis* relief in civil cases, very different considerations of policy should be controlling with respect to criminal cases, especially where a defendant's life or liberty is at stake. See *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (App. D. C., 1941).

In the *Bradford* case, the Court quoted the following passage from an opinion in *Moore* v. *Cooley*, 2 Hill 412 (N. Y. Special Terms, 1845):

> "'There can be little doubt that the (*forma pauperis*) statute under which this motion is made, should be construed strictly; for the pauper comes to litigate entirely at the expense of others. He is neither to pay his own attorneys or counsel, nor is he liable to his adversary should the suit prove to be groundless. He thus enjoys a great privilege and exemption from the common lot of men, whereby, in respect to causes of action proper, he becomes, as Lord Bacon says, rather able to vex than unable to sue. (Hist. of Hen. 7).'"
> 195 U. S. at 249.

In other words, in a civil case, a plaintiff pauper, if freed of expense, can vex a defendant under conditions in which it is not easy to prevent abuse. But in a criminal case there is no such risk. On the contrary, the party adverse to the pauper, the public, should be just as interested as the pauper himself in assuring a complete and fair hearing. *Cf. United States* v. *Barber*, 140 U. S. 164, 166-167 (1891); see also *supra* p. 17.

Therefore in construing a court's powers to extend aid to a pauper in a criminal case, a liberal rather than strict attitude should prevail; the matter is not dissimilar to the construction of statutes affording aids to seamen in litigating their rights, where the courts have taken a liberal attitude. 28 U. S. C. A. §837; see *Bainbridge* v. *Merchants & Miners Trans. Co.*, 287 U. S. 278, 282 (1932); *Grant* v.

United States Shipping Bd. Emergency F. Corp., 24 F. (2d) 812, 813 (C. C. A. 2, 1928); *The Astra*, 34 F. Supp. 152, 153-154 (D. Md., 1940); *cf. Warner* v. *Goltra*, 293 U. S. 155, 158-159 (1934). But *cf. Ex parte Abdu*, 247 U. S. 27, 29-30 (1918).

Another reason for believing that the *Bradford* case was not intended to overrule the *Gildersleeve* and other cases is that the former dealt solely with the costs in an appellate court rather than with the powers of a trial court. Indeed the opinion emphasized that an appeal was entirely a matter of statute and not of common law. 195 U. S. at 250; *cf. Ex parte Abdu*, 247 U. S. 27, 30 (1918).

A trial court has very extensive inherent powers, even in a civil case, to appoint persons to aid in the discharge of justice and to incur costs therefor which may be assessed against the parties. In *Ex parte Peterson*, 253 U. S. 300 (1920), it was held that, despite absence of statutory authority, a federal district court could retain an auditor, with a stenographer, to conduct an investigation in a civil law suit in order to straighten out and simplify issues, and could assess the costs thereof against the losing party. Similarly, Rule 80 of the *Rules of Civil Procedure* provides that the district courts may designate official stenographers to take down the evidence, and that their charges will be taxable as costs in the discretion of the trial judge. In the nature of things a trial court, as distinguished from an appellate court, must have considerable latitude to proceed in whatever manner may best aid in assuring that justice is done, that a clear record is made up, and that, especially in criminal cases, an indigent is protected.[1] And if, to meet the ends of justice, costs may be incurred at the court's

[1] The propriety of a trial court's dealing with matters of this kind in whatever manner best suits the case is illustrated by rulings that ordinarily, even in a case admittedly falling within the scope of the Act of 1892 (it was amended in 1910 to include appellate proceedings) a pauper should make an application to appeal *in forma pauperis* to the trial court rather than to the appellate court. *Smith* v. *Johnston*, 109 F. (2d) 152, 155 (C. C. A. 9, 1940).

direction, despite absence of statutory authority, assessable against private parties in a civil case, there is even stronger reason that the trial court should have a broad discretion to see to it that necessary aids are provided in a criminal case and, where the defendant is a poor person, to incur expense which will be met by the Government. Indeed, such aid in procuring a transcript to make up the record must be contemplated by the provision of Rule 7 of the *Rules of Criminal Procedure after Verdict* that, when a notice of appeal is filed, the trial judge shall give

> "directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings."

The fact that the trial court's power which is in question relates to taking action for the purpose of appellate review and that the right to such review is statutory, should not affect the situation. In the first place, the power of a trial court to have a clear record made up should be assessed with a view to other needs, as well as those of appeals.[1] In the second place the denial of power in the *Bradford* case related only to the costs in the appellate court itself, the functions and operations of which, unlike those of a trial court, are dependent solely upon the conditions laid down by the legislature.[2] And in the third place if, as the authorities already reviewed demonstrate, a trial court does have broad powers apart from statute to do its work, the fact that a particular task is placed upon it by statute—that of preparing a case for appellate scrutiny—should not mean that it cannot bring to the discharge of that task all its powers.[3]

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[1] The report of a committee of the Judicial Conference, appointed to study the system of court reporting in the federal courts, points out:

> "Even in cases where there is no appeal, a record should be made of proceedings had in open court because of the importance they may have in matters arising in the future. This is true even in criminal trials and submissions, where the proceedings had may be important

It must, therefore, be concluded that there is nothing in the *Bradford* case which impairs the force of this Court's earlier decisions, in the *Gildersleeve* and other cases, respecting the inherent power of a trial court to incur expense in order to protect a defendant charged with crime. Nor are there any later cases which qualify those decisions. In fact, of later cases, *Ex parte Peterson* is most nearly applicable and both the holding and the opinion in that case support the view of a trial court's inherent power which is represented by the *Gildersleeve* case.

We may turn now to the actions of Congress.

B. *No Act of Congress Has Limited the Inherent Power of a Trial Court to Assist a Pauper Defendant in a Criminal Case by Providing Him With a Transcript of Testimony in Order to Make up a Record.*

The Act of 1892, to which we have already referred, *supra*, p. 27, providing for *in forma pauperis* relief to plaintiffs in civil cases, originally read as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any citizen of the United States, en-

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in proceedings looking to the parole of the prisoner or his release under writ of habeas corpus."

See pages 2-3 of the letter of Judge John J. Parker to the Director, Administrative Office of the United States Courts, transmitting a draft of a bill to provide for court reporters, dated October 24, 1941. It should be observed, also, that a trial court may well need a stenographic transcript, in certain circumstances, to aid it in making rulings at the trial, in instructing the jury, in passing on motions for a new trial, and in other respects not related to preparation for an appeal.

[2] But cf. *supra*, pp pp. 21, 26.

[3] For example, a court's inherent power, in the absence of statute, to permit a plaintiff to sue *in forma pauperis* should not be denied where the plaintiff's cause of action happens to be statutory in origin. The considerations mentioned in the text were overlooked by the lower court in *Rucker* v. *Superior Court*, 104 Cal. App. 683, 286 Pac. 732 (1930). This was a civil case in which, despite *Martin* v. *Superior Court*, *supra*, pp. 22, 23, it was held that, in the absence of statutory provision therefore, a court would not furnish a transcript to a pauper for the purpose of a record on appeal.

titled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."

The purpose of the Act was set forth in the report of the House Committee on the Judiciary (HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.) and in debate upon the original bill in the House of Representatives (23 CONG. REC. 5199). The House Report stated:

"This Bill proposes to open United States Courts to a class of American citizens who have rights to be adjudicated, but who now are excluded practically for want of sufficient money or property to enter the courts under their rules * * * In short, this bill presents the question whether this Government, having established courts to do justice to litigants will admit the wealthy and deny the poor entrance to them to have their rights adjudicated * * * The question is narrowed therefore to this: Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance to pay to the tribunals of justice. Many humane and enlightened states have such a law, and the United States Government ought to keep pace with this enlightened judgment."

After the decision in the *Bradford* case, section 1 of the Act of 1892 was amended in 1910 to approximately its present form, not including the last sentence of the present section, which was added later.[1] The amending statute is the Act of June 25, 1910, c. 435, 36 Stat. 866.

The original bill in the Senate merely enlarged the 1892 Act to include appellate proceedings so as to correct the defect found in the *Bradford* case. In the debates on this bill, Senator Bacon said:

"The sole purpose of this bill is to enlarge the law as it now stands upon the statute books as it has been construed by the Supreme Court, so that one who is unable to pay the costs of a suit shall not only be permitted to pursue it in the court where it originates, but also in the appellate courts." 45 CONG. REC. 1532.

After the bill had passed the Senate the House Committee (HOUSE REPORT No. 1591, 61ST CONG., 2ND. SESS.), amended

[1] None of the other four sections of the Act of 1892 has ever been amended. The exact changes in the wording of section 1 effected by the 1910 amendment are shown in the opinion in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 44 (1915). The present wording of the Act, showing how it has been changed by amendments, appears in Appendix C hereto.

it to include criminal cases and defendants, and so the act was adopted. The House Committee did not state any specific reason for adding the language on criminal cases and defendants, and no mention is made of these particular additions in the debates.

In 1916 the District Court for the Northern District of California decided *United States* v. *Fair*, 235 Fed. 1015. This is the first of a series of cases in the lower federal courts in which it has been said or held that an indigent defendant in a criminal case is not entitled, under the Act of 1892 as amended, to be furnished, without cost to him, with a transcript in order to make up a record. None of these cases refers to the decision of this Court in the *Gildersleeve* case, *supra*, p. 28), and practically all of them rely upon the *Fair* case.

In the *Fair* case, after his conviction of using the mails to defraud, the defendant moved the trial court for an order directing the reporter to transcribe the testimony at the Government's expense in order that he might present a bill of exceptions. The court held that section 5 of the Act of 1892 made this impossible because of the proviso in that section stating that the United States is not liable for costs incurred by a judgment for costs. The court also stated that the reporter was not an officer of the court, but reported the case simply under contract with the Department of Justice, and that therefore the court could not order him to transcribe his notes without compensation.[1]

The reasoning in the case, at least with respect to the impossibility of charging the Government with the cost of the transcript, is wholly fallacious and deprives the entire series of the later cases relying on the *Fair* case of persuasive authority.

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[1] It has since been held that the same result must be reached even if the stenographer is an official court reporter. *Estabrook* v. *King*, 119 F. (2d) 607 (C. C. A. 8, 1941).

Section 5, it will be recalled, provides:

> "That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."

It will also be recalled that this section appeared in the Act of 1892 and was not affected by the 1910 amendment. It will be recalled further that the Act of 1892 applied only to a pauper plaintiff in a civil case.

Section 5 was adopted to meet the following situation. A pauper plaintiff might later come into funds. Therefore there could be no reason for denying to a defendant, in circumstances where he would otherwise be entitled to judgment for costs from a plaintiff, the right to such judgment merely because the plaintiff was a pauper at the time suit was brought. The same thing would be true of an officer of the court who had the right to collect fees from parties for his personal account. Therefore section 5 as first reported to the House by the Committee on the Judiciary provided:

> "That judgment may be rendered for costs at the conclusion of the suit as in other cases." 23 CONG. REC. 5199.

From this section as originally proposed, however, there might have arisen an implication that if the pauper could not pay the judgment for costs the Government would have to pay it to the party in whose favor judgment was entered. This plainly was not intended. Nevertheless, someone wanted it to be absolutely clear, so Mr. Culberson, in charge of the bill, stated at the conclusion of the debate in the House:

> "Mr. Speaker, I am under obligations to a gentleman who is not present in the House to offer an amendment, which will not alter the main provisions, *and which I think is unnecessary*, but which I now offer. At the end of Section 5 to insert the words: *Provided*,

> That the United States shall not be liable for any of the costs thus incurred." 23 CONG. REC. 5199. (emphasis supplied).

This was the only discussion of the matter and the amendment was adopted.

Thus the proviso in section 5 did nothing more than to negative any implication that the United States would pay a judgment for costs entered against a pauper plaintiff in a civil suit.[1] It does *not* state, as the court in the *Fair* case said, "that Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act". 235 Fed. at 1016. And when the 1910 amendment extended section 1 of the Act to cover an indigent defendant in a criminal case, it did not translate section 5 into a prohibition against payment by the United States of any expense in connection with aiding the indigent; at most it meant that when, for instance, clerks collected fees for their personal account, the United States would not pay, for the pauper, a judgment for costs entered against him in the clerk's favor.[2]

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[1] There is an alternative meaning which may be attributed to the proviso in section 5, which is consistent with the brief discussion of the proviso in the House debates. That alternative is that Congress merely meant to negative any possible implication that section 5 modified the long standing rule against assessing costs against the United States as a litigant in a case where the United States is a party. It would, of course, not follow that the United States should never bear any of the expense of making justice available to paupers accused of crime in its courts. This argument is developed at length in a very exhaustive brief filed in this Court on behalf of the petitioner in *Evans* v. *United States*, 312 U. S. 651 (1941), see *infra*, p. 55. This brief is still available in this Court's files and has proved of great assistance to present counsel.

[2] The statement in the text assumes that when section 1 of the Act of 1892 was amended in 1910 to cover criminal cases, section 5 was intended likewise to apply to criminal cases. However, this may never have been intended at all. The section simply reflects a page of history. The Statutes of 11 Henry VII, *supra*, p. 20, and of 23 Henry VIII, *supra*, p. 20, n. 1, relieved a pauper plaintiff in civil suits from the necessity of paying fees or costs, but it has been thought that some judges insisted that if the pauper were non-suited he had either to pay the costs or be whipped. Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 374-375

The conclusion that section 5 deals solely with the mechanical matter of entering judgment for costs is supported by this Court's description of the section in its opinion in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43 (1915). The Court said:

> "The fifth and last section points out the manner of entering judgment concerning costs in cases under the statute." 236 U. S. at 45.

This statement was made in the course of a discussion in which this Court reviewed all the provisions of the statute, as amended in 1910. Surely if the proviso in section 5 had the character of a sweeping prohibition against the United States' bearing any expense of aiding a pauper, as held in the *Fair* case, this Court would have paraphrased it in very different terms.

It would serve no useful purpose to discuss the later cases on the question whether the United States can pay for a transcript. As we have indicated, they rely on the *Fair* case and are subject to its infirmities. See *United States ex rel. Estabrook* v. *Otis*, 18 F. (2d) 689 (C.C.A. 8, 1927); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C.C.A. 3, 1939); *Estabrook* v. *King*, 119 F. (2d) 607

(1923). Like some other curious practices attributed to the days of yore, this one may be apocryphal. Note, *Proceedings in Forma Pauperis*, 31 HARV. L. REV. 485 (1918). And one court pointed out that in any event it could not follow the practice because it had no whipping machinery. *Ibid.* However, there is no question but that an earlier liberality toward pauper plaintiffs produced a reaction, as the result of paupers' having abused their privilege to the vexation of defendants, and the English courts became very severe in their treatment of pauper plaintiffs who brought suits which failed. Maguire, *op. cit. supra* p. 21, at pp. 374 *et seq.* So section 5 of the Act of 1892 was originally designed to curb paupers too eager to litigate. Indeed, the House Committee explained the section as follows:

> "And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.

Therefore, it is quite to the point to suggest that section 5 has no application whatsoever to a criminal case, since the need "to avoid possibility of imposition" is wholly lacking in such a case.

(C.C.A. 8, 1941); *United States* v. *Strewl*, 28 F. Supp. 87 (N. D. N. Y., 1937); 9 Comp. Gen. 503 (1930); *cf. Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721, 724 (C.C.A. 5, 1941); *Cheek* v. *Thompson*, 33 F. Supp. 497, 499 (W. D. La., 1940).

It should be observed, however, that the lower courts have not uniformly followed the *Fair* case. See order [1] entered in *United States* v. *Ramsey*, N. D. Okla., quoted in 9 Comp. Gen. 503 (1930); see reference to action in *United States* v. *Thompson*, W. D. Ky., in *Thompson* v. *King*, 107 F. (2d) 307, 308 (C.C.A. 8, 1939).

As we shall show later, the Act of 1892, as amended, must be taken to contemplate that the pauper defendant will have the benefit of a transcript of the testimony, without cost to him, in order to make up the record. However, even if the Act made no such provision, there remains the inherent power of a trial court to see to it that the pauper gets his record, at the expense of the United States if necessary. *Supra*, pp. 20-34. This power was recognized before 1910, the *Fair* case was incorrect in interpreting section 5 of the Act of 1892, as prohibiting such action, and there is nothing else in the Act prohibiting it.

That Congress has by statute made partial provision for a pauper does not mean that a court's inherent power to extend further assistance is wholly superseded by the statute. We have seen that this Court, in *United States* v. *Van Duzee*, *supra*, p. 28, held that a statute, providing that a defendant in a capital case should be furnished a copy of the indictment without cost, did not mean that, in a non-capital case the court could not, where appropriate, require that the same thing be done at the Government's expense. We have also seen that, in *United States* v. *Gildersleeve*, *supra*, p. 28), the Government argued that R. S. §878, providing for the Government's meeting the expense of witnesses for an indigent criminal defendant,

[1] This order will be found *infra*, p. 51, n. 1.

must be taken as the exclusive definition of such a defendant's privileges; but this Court held that the Government could be required to pay for transcribing the stenographer's notes and other expenses in connection with the preparation of a record.

So, when Congress extended the Act of 1892 to criminal cases—even if it be assumed that that Act does not make complete provision for the pauper—it does not follow that Congress meant to restrict the judiciary's pre-existing powers to aid the indigent. They remain—at least until barred by a prohibition more explicit than can be found in a statute in which Congress was trying to lend a helping hand. *Cf. Martin* v. *Superior Court, supra*, p. 23.

C. *The Act of 1892, as Amended, Empowers a Trial Court to Assist a Pauper Defendant in a Criminal Case by Providing Him with a Transcript of Testimony in Order to Make Up a Record.*

In any event, the Act of 1892 itself, as amended, does authorize a trial court to furnish a transcription of the stenographer's notes for the purpose of perfecting the record without cost to a pauper defendant.

If this was not the case after the 1910 amendment, it was certainly true after a further amendment occurring in 1922.

Section 1 of the Act, as amended in 1910, provides that a pauper may defend and appeal a case, civil or criminal, and shall not be "required to prepay fees or costs or for the printing of the record in the appellate court." In 1922 there was a further amendment consisting of the addition at the end of section 1 of the following:

> "Provided, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing

the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General." Act of June 27, 1922, c. 246, 42 Stat. 666.

The 1922 amendment was prompted by a ruling of the Comptroller of the Treasury in 26 Comp. Dec. 362 (1919), rendered subsequent to the decision of *United States* v. *Fair*, *supra*, p. 37.

The Attorney General had asked the Comptroller whether he could authorize the printing of a record, at the Government's expense, upon a pauper's appeal in a criminal action. The Comptroller concluded that while, prior to the 1910 amendment to the Act of 1892, this could have been, and was, done, the 1910 amendment made that impossible. He applied the same reasoning as that in the *Fair* case: that is, he translated the proviso in section 5 of the 1892 Act into a prohibition against the Government's bearing any expense in connection with the aid afforded to a pauper. Thus, as did the court in the *Fair* case, he concluded that Congress, in trying to be helpful to indigent criminal defendants in 1910, had actually curtailed the courts' power to aid them as that power had theretofore existed.

Then the Comptroller went on to point out that in the Act of February 13, 1911, c. 47, 36 Stat. 901, 28 U. S. C. A. §§ 865, 866, adopted within less than a year after the 1910 amendment to the Act of 1892, Congress provided that the record on appeal must be printed in all cases. This, ruled the Comptroller, meant that Congress had defeated its own purpose. The 1910 amendment permits the pauper to appeal; the 1911 Act requires that a record on appeal be printed in all cases; section 5 of the 1892 Act, he said, prohibits the Government from bearing any expense in connection with the aid afforded a pauper; therefore the pauper cannot enjoy

his appeal! And, not daunted by his logic, he drove home his point with this extraordinary statement:

> "While running through all of the statutes quoted is evidence of a benevolent intention on the part of Congress that a poor defendant shall have the free and unrestricted right from a financial standpoint to make his full defense to final conclusion, yet the effect of the statutes seems to be to render this intention nugatory, since the final requirement of the legislation, a printed record, is expressly prohibited from being furnished at the cost of the United States." 26 Comp. Dec. at 364.

Such uninspired preoccupation with words in a book, defying the admitted intention of Congress, would, if generally followed, make Congress impotent to effect its will.

It may be noted in passing that exactly the same kind of dry logic has been rejected by one court in connection with a very similar argument. In 28 U. S. C. A. §549 there is a general provision that a fee of five dollars must be paid to the clerk before filing a suit. A pauper, desiring to file a suit, applied for leave to proceed *in forma pauperis* under the Act of 1892. It was suggested that an application to proceed *in forma pauperis* is itself the institution of a proceeding and that therefore the pauper would have to pay five dollars before filing such an application with the district court. Judge Denman made short shrift of that argument, saying:

> "It is irrational to suppose Congress intended the mockery of appearing to give the pauper the remedy of § 832 (*i. e.* the Act of 1892) and then requiring him, without funds, to pay $5.00 to procure the relief." *Ex parte Hall*, 31 F. Supp. 86, 87 (N. D., Calif., 1940).

The ruling of the Comptroller of the Treasury imputing the mockery of allowing an appeal *in forma pauperis*, but at the same time denying the means for appeal, was equally irrational.

Faced with this Comptroller's ruling, the Attorney General addressed to Congress a letter [1] concluding:

> "May I suggest that, in order that poor defendants' rights in criminal cases may be fully conserved, the act of June 25, 1910, be amended by the addition of a proviso in substantially the following form:
>
> "'*Provided*, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.'"

The Congress, after favorable Committee Reports,[2] adopted the Attorney General's recommendation, in order —to use his words—"*that poor defendants' rights in criminal cases may be fully conserved*". And thus the statute stands today.

It is submitted that the Comptroller of the Treasury, in ruling in 1919 that Congress had failed to carry out its evident intention, was wrong. The law is what Congress intends it to be. The words it uses are but a vehicle, and, however inept or ungrammatical the language, it is the intention which is controlling. Therefore, when Congress has provided that poor defendants in criminal cases may defend and appeal their cases and has evidenced an intention that this be accomplished without cost to them, its will should not be defeated by the technique of interpretation which has made the drafting of appropriation acts the riskiest business in government.

Nevertheless, as we have seen, the influence of *United States* v. *Fair*, 235 Fed. 1015 (N. D. Calif., 1916), has persisted with certain of the lower courts and with the Comp-

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[1] The letter is set forth in SENATE REPORT No. 20, 67TH CONG., 1ST SESS., and in HOUSE REPORT No. 626, 67TH CONG., 2D SESS.

[2] Cited in the preceding note.

troller General. *Supra* pp. 40, 41. The amendment of 1922 has been subjected to the same technique which vitiated the amendment of 1910. However impossible it may be to print a record from shorthand notes, without having them transcribed so that the printer can read what he is to print, it is the Comptroller General's ruling that even though Congress has most explicitly provided for printing the record at the Government's expense in order that the pauper's appeal may be heard, the pauper must still pay for the transcript. This ruling was rendered in defiance of an order of a federal district court, see *infra*, p. 51, n. 1, requiring a transcription at the Government's expense. 9 Comp. Gen. 503 (1930). The "benevolent intention" which Congress admittedly had has not inspired the interpretation of the law.

The result is that not only is the will of Congress defeated but paupers are treated capriciously. The Comptroller General said in 9 Comp. Gen. 503 (1930) that if the court reporter were employed by the Government at an annual salary instead of on a piecework basis the question of requiring him to furnish a transcription to go into the pauper's record "would be an administrative matter." In a recent case this very situation arose. A pauper had been denied the privilege of securing a transcription of the stenographer's notes of testimony for the record on appeal. After this Court granted certiorari, the Government agreed to a remand when it appeared that the stenographer was paid an annual salary of $500 to serve as court reporter and that the Government could secure a transcript and furnish it to the pauper without additional expense. *Evans* v. *United States*, 312 U. S. 651 (1941).

To make such relief to a pauper dependent upon a circumstance as fortuitous as whether the reporter is employed on a piecework or salary basis raises a serious question of arbitrary discrimination violating the guarantees of the Fifth Amendment.

As a matter of fact, the Court of Appeals for the District of Columbia recently suggested—although finding it unnecessary to decide the point in that case—that it might violate this Constitutional guarantee to give the privilege of appeal to those able to pay but to deny it to paupers in serious criminal cases involving their lives and liberty. That court said in *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (1941):

> "While due process under the Fifth Amendment,[1] as under the Fourteenth,[2] does not require appellate review, nevertheless when Congress creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations.[3]
>
> "The assumption has been widespread that Congress has absolute power to grant or withhold appeals

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[1] *Cf. Cobbledick* v. *United States*, 1940, 309 U. S. 323, 325, 60 S. Ct. 540, 84 L. Ed. 783, referring for the history of federal criminal appeal to *United States* v. *Sanges*, 1892, 144 U. S. 310, 319-322, 12 S. Ct. 609, 36 L. Ed. 445; *Applebaum* v. *United States*, 7 Cir., 1921, 274 F. 43; *Haywood* v. *United States*, 7 Cir., 1920, 268 F. 795, 798, certiorari denied, 1921, 256 U. S. 689, 41 S. Ct. 449, 65 L. Ed. 1172.

[2] *Frank* v. *Mangum*, 1915, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969; *McKane* v. *Durston*, 1894, 153 U. S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867; *Smith* v. *Bastin*, 1921, 192 Ky. 164, 232 S. W. 415.

[3] In *Frank* v. *Mangum*, 1915, 237 U. S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969, the Court recognized that due process does not require the state to provide for an appeal, but added: "* * * it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of the law under which he is held in custody by the state, and to be considered in determining 'any question' of due process. *Cf. United States ex rel. Henson* v. *Mills*, D. C. E. D. Pa. 1937, 21 F. Supp. 616.

That a state statute which, in the particular circumstances, did not afford an adequate opportunity for taking an appeal generally available, resulted by virtue of its application to those conditions in an unconstitutional discrimination, see *State* v. *Guerringer*, 1915, 265 Mo. 408, 178 S. W. 65.

in forma pauperis.[1] No doubt there is wide latitude for determining how far the Government may be required to bear the costs of civil litigation. It may be assumed also that there is room for some discretion concerning the costs of defense in criminal matters. But when the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens. The right of appeal, though statutory, is not insubstantial,[2] and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily.

[1] Cf. *De Maurez* v. *Swope*, 9 Cir., 1939, 104 F. (2d) 758, and authorities cited.

[2] As shown by the volume of reversals in criminal cases. During the fiscal year ending June 30, 1940, reversals took place in twenty-four per cent of all criminal cases in which appeals were taken to the United States Circuit Courts of Appeals and this court. Annual Report of the Director of the Administrative Office of the United States Courts (1940) 59.

It cannot be that Congress meant to raise Constitutional doubts, or to involve the United States in such arbitrary discrimination as is shown by the difference between the treatment of the pauper in the *Evans* case, *supra* p. 46, and the treatment thus far of this petitioner.[3]

[3] Despite the statutory origin of the right to appeal, arbitrary discrimination in permitting appeals will violate both the equal protection, *Cochran* v. *Kansas*, 316 U. S. 255 (1942), and the due process guarantees. *Janes* v. *Commonwealth*, 269 Ky. 779, 785, 108 S. W. (2d) 816, 819 (1937); *Life & Casualty Ins. Co.* v. *Womack*, 228 Ala. 70, 71, 151 So. 880, 881 (1933); *State* v. *Guerringer*, 265 Mo. 408, 416-417, 178 S. W. 65, 67 (1915). Hence if circumstances are such as to make it practically impossible to make up a bill of exceptions without a transcript of testimony, it may well be that Constitutional rights are denied to a pauper unless the Government provides the transcript. In any case it is discrimination of the most arbitrary character for the Government to furnish a transcript to some paupers but not to others, depending solely upon the nature of its arrangements with court reporters.

It is suggested that what Congress really meant in its 1910 amendment to the Act of 1892 is this:

The inherent powers of a trial court to aid an indigent in a criminal case, at the Government's expense if need be, were not to be curtailed in any way, but, having those powers in mind, Congress set up a procedure to be followed in affording that relief, with a statutory standard to guide the exercise of a court's discretion. The amended section 1 of the Act states that one may defend his case to conclusion and appeal it, unless the trial court certifies that the appeal is not in good faith, when he shows his inability, because of poverty, to pay the costs of doing so. This broad provision must mean that the pauper will be enabled to do whatever is appropriate in the particular case to accomplish his appeal. If so, and if expense to the court will be involved to accomplish the end, the statute authorizes the expense and the appropriation for miscellaneous expenses of the United States courts is available to meet it.

In addition the Act specifically provides that the pauper defendant will not be required to "prepay fees or costs or for the printing of the record".

Thus the 1910 Amendment to the Act of 1892 left the situation with respect to expense involved in *in forma pauperis* relief as follows. Costs and fees to the regular officers of the court are not paid initially by the pauper. One who is an officer of the court must go ahead and perform his duties, subject to his (or the Government's) right to a judgment for costs against the pauper in an appropriate case.[1] But if the court finds it appropriate to exercise

[1] In view of the fact that payment of fees for the personal account of the regular officers of the court has been largely abolished, except in the case of the official court reporter, the situation today is quite different from what it formerly was. However, the history of the Act of 1892 confirms the statement made in the text. The Act of 1892 as originally introduced provided that "* * * the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit

its power to appoint a stenographer or other aid, the expense of which would ordinarily be assessable as costs, *cf. Ex parte Peterson*, 253 U. S. 300 (1920); Rule 80, *Rules of Civil Procedure*, then the United States will meet that expense subject to the right to have judgment for costs under section 5, just as it would have to meet the expense of printing the record under the express language of section 1.

Whether an official court reporter is an officer of the court, even though he is on a piecework, rather than salary, basis, need not now be decided. If he is, he is probably entitled only to have judgment for his costs against the pauper.[1] If he is not, then the court can have his expense

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without fee or reward". See H. R. 583, 52ND CONG., 1ST SESS., on file in library of United States Senate. However, the House Committee eliminated this provision, pointing out, as noted *supra*, p. 40, n.:

"* * * to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.

The debate on the bill in the House discloses the following colloquy with Mr. Culberson, who was in charge of the bill:

"Mr. William A. Stone: In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for costs, how do the officers get their pay?

"Mr. Culberson: They do not get anything in that event.

"Mr. William A. Stone: Then you are simply compelling the officers to do that work for nothing.

"Mr. Culberson: We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing, that is what the bill does. There may be one such case upon their docket of 500 and they are not required to do much ex officio service." 23 CONG. REC. 5199.

[1] See the preceding footnote. This is not unduly harsh. The privilege of serving as court reporter is a practical monopoly which is so valuable that the Government in some cases is actually paid, and in other cases is furnished free service, by the reporter in return for that privilege. And as the debates in the House of Representatives quoted in the preceding footnote show, *in forma pauperis* cases are not numerous; still less numerous would be such cases where the court felt it necessary to have a reporter furnish his services. This would be done only in cases where it is important because of the nature of the case.

paid for from the appropriation for miscellaneous expenses of the United States courts, and presumably the Government can have judgment for such cost.

Thus far in this summary we have been discussing the Act of 1892 as amended in 1910. However, the 1922 amendment, adding to the act the last sentence of the present section 1, would appear to meet the petitioner's contention in this case even if the *Fair* case, interpreting the 1910 amendment, was correctly decided. For the 1922 amendment, designed, as we have seen, *fully to conserve the rights of a criminal defendant, supra*, p. 45, provides in terms that "the expense of printing the record on appeal" shall be paid by the United States. A fair reading of this amendment, motivated as it was, would include the expense necessarily involved in so translating the notes that there can be a legible record for the printer to read, where such notes must be resorted to in order to make up the record.[1]

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[1] As indicated in the preceding footnote, the transcription would not have to be made in every case. The order entered in *United States* v. *Ramsey* by the United States District Court for the Northern District of Oklahoma, which was the occasion for the ruling in 9 Comp. Gen. 503 (1930), see *supra*, p. 46, illustrates the circumstances under which a court might properly invoke a reporter's aid. That order (set out in the Comptroller General's opinion) provided:

> "Order requiring stenographer to make typewritten transcript of testimony in John Ramsey case at Government expense.
>
> "Now on this 27th day of January, 1930, this matter came on to be heard before me, Franklin E. Kennamer, judge of the district court in and for the northern district of Oklahoma, of the United States of America, upon the application of the defendant, John Ramsey, for an order requiring the stenographer taking said testimony on and after the 24th day of November, 1929, to transcribe the same and make certain typewritten copies and furnish the same to counsel of record at the expense of the Government, and the court after being fully advised in the premises and after carefully considering the same finds, that the said defendant has heretofore filed in this court an application in which it is stated that the said defendant is a man without means or friends or relatives who have means with which to pay the said expense, and it being further within the knowledge of

As a matter of fact, were there any doubts remaining, Congress has set them fully at rest by including in the appropriation for miscellaneous expenses of the United States courts a specific item for

> "stenographic reporting services without regard to section 3709, Revised Statutes, provided that the rates of payment shall not exceed those fixed by the district court pursuant to Rule 80(b) Federal Rules of Civil Procedure, in the jurisdiction of which the services are rendered * * *."

This item first appeared in the appropriation for the fiscal year ending June 30, 1942. 55 Stat. 265, 301. It was continued this year. Public No. 664, 77th Cong., 2nd Sess., c. 472, Title IV. At p. 707 of the hearings before the House Committee on Appropriations on the appropriation bill for 1942, Mr. Chandler, Director, Administrative Office of the United States Courts, explained the provision as follows:

> "The reason for this provision is that occasionally, not often, the courts need to have a record made of a proceeding in which the court is concerned. The principal example is a disbarment proceeding * * *."

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the court that the said John Ramsey has heretofore made application for counsel to be appointed for him on account of his poverty and has made written application heretofore for the testimony to be taken at his said trial at Government expense and said verified application has been allowed and said testimony taken, and it being further within the knowledge of the court that the said John Ramsey was convicted of murder and alleges error and desires to appeal from the judgment and sentence, and on account of the large number of witnesses, and the volume of testimony taken consuming some five days, that it will be impractical if not impossible for the same to be agreed upon between counsel and set forth in narrative form and the same being an important case involving a life sentence.

"It is therefore ordered, adjudged, and decreed that the said testimony be transcribed in typewritten form and copies furnished counsel for the defendant and counsel for the Government in addition to the copies for Circuit Court of Appeals."

In view of the historical responsibility of the courts toward pauper defendants in criminal cases, particularly in a case involving a defendant's life and liberty, the interest of a court in such a proceeding is quite as great as its interest in a disbarment proceeding. The broad language used by Congress must, therefore, make the appropriation available, in a case such as this petitioner's, to pay for the transcript if, under the circumstances, a court decides that a transcript is the appropriate means for making up the record.

IV.

Regardless of the Inherent Power of a Court to Aid a Pauper, and Aside from the Meaning of the Act of 1892 as Amended, this Case Should Be Remanded With Instructions Requiring the Preparation of a Bill of Exceptions.

We have already shown that the petitioner was led to believe that he could not have appellate review of the errors he wished to present unless he could buy a transcript. Even if a court cannot order that a transcript be prepared at Government expense, there are other ways to make up a bill of exceptions, and the judge, with the assistance of his secretary who was the official reporter at the trial and whose notes are still available, could cooperate with the petitioner and the district attorney to see that a proper bill of exceptions is presented. See *supra*, pp. 17, 18. The task is much simpler than that set for the parties in *Holmes* v. *United States*, 314 U. S. 583 (1941).

However, the striking thing about this case is that *no one could legally pay the reporter for a transcript.* As a matter of fact, the petitioner has already been wrongfully charged by the reporter for the partial transcript which actually was furnished.[1]

[1] Appendix A hereto shows that the reporter was paid $50 by the petitioner for this portion of the transcript "which sum was also to compensate him for his work during the eight days that the trial lasted".

The court reporter was the secretary to the trial judge, and, as the Government's answer to the petitioner's "Petition for Rehearing" in the Circuit Court of Appeals points out, the Government itself is prohibited from paying a secretary to a trial judge for acting as court reporter or for transcribing notes of testimony at a trial (R. 14). See *United States* v. *Saunders*, 120 U. S. 126, 129 (1887); *Woodwell* v. *United States*, 214 U. S. 82, 88 (1909); 19 Comp. Dec. 760 (1913); 20 Comp. Dec. 731 (1914); 15 Comp. Gen. 828 (1936). But *cf.* 18 Comp. Dec. 132 (1912); 16 Comp. Gen. 909 (1937). *And the Comptroller General has ruled that a secretary to a trial judge in a federal district court may not lawfully be paid by private parties for reporting trials in that court.* 5 Comp. Gen. 650 (1926).[1]

Thus even if this petitioner had been able to pay for the full transcript it could not lawfully have been paid for by him.

In these circumstances, since the reporter is the trial judge's secretary, and therefore subject to the judge's orders, it would appear that the most appropriate course would be for the judge to direct his secretary to transcribe the notes, regardless of the meaning of the Act of 1892.

V.

Even Though a Decision as to the Power to Furnish a Transcript to a Pauper May Prove Unnecessary in this Case, It Would Be Desirable to Notice and Correct the Erroneous Decisions on the Point Heretofore Made by Lower Courts.

There are few subjects of such deep concern to the judiciary as the protection of the poverty-stricken and the

[1] The Comptroller General's ruling was that such a payment would violate a prohibition in 5 U. S. C. A., § 66, against a Government employee's receiving compensation from private sources in connection with his Government work. He also ruled that full-time employment by the Government is inconsistent with devoting time during business hours "to work of a private nature."

ignorant who rely on it for justice. A step somewhat out of the ordinary may be appropriate to further that protection.

Whether or not *United States* v. *Fair*, the cases relying on it, and the Comptroller General, have correctly interpreted the Act of 1892 as amended, *supra*, pp. 27, 34, the decision below should be remanded. *Supra*, pp. 53, 54. Hence it may not be absolutely necessary to determine what power, inherent or statutory, a trial court has to furnish a transcript to a pauper without cost to him. However, such a determination by this Court would certainly be helpful as a guide to the trial court upon a remand of this case.

There is a further reason for making such a determination at this time. If the *Fair* case, and the others, were wrong—as they clearly seem to be—it is high time that the error be rectified. The Comptroller General cuts off payment for a transcript even though a court has decided that it should be furnished at Government expense. *Supra*, p. 46. Only a decision by this Court can correct such action. Moreover, the error in the *Fair* case is persistently repeated in the administration of the business of the United States courts, despite the fact that there is not a single instance where a court has explored the problem with care in the light of the legislative history and having in mind a court's inherent powers as exemplified by the *Gildersleeve* case. *Supra*, p. 28. Indeed, that case has been ignored.

Once before the question was presented to this Court, but upon the Government's agreement to a remand the question was not decided. *Evans* v. *United States*, 312 U. S. 651 (1941), *supra*, p. 46, and p. 39, n. 1. It seems unfortunate that erroneous denial of aid to paupers should be continued until, in the fortuitous course of events, a case happens to appear that compels decision. For in the meantime there must be many able members of the bar who feel that the practice of denying such aid, however errone-

ous in conception, cannot be overcome. And a pauper's case is not likely to encourage pursuit of the long and expensive road to this Court.

The responsibility for correction is not Congress' alone. Congress has twice taken steps which it believed to be helpful—once on the express representation of the Attorney General that *it was thereby fully conserving poor defendants' rights in criminal cases. Supra*, p. 45. The courts and the Comptroller General—not Congress—have failed. This Court should correct the fault.

The fault has put the administration of justice in the United States courts out of step with most of the civilized world. This is in spite of the fact that, in starting the Act of 1892 upon its way in Congress, the House Committee on the Judiciary stated:

> "Many humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment." HOUSE REPORT No. 1079, 52ND CONG., 1ST SESS.; *supra*, p. 36.

It is only reasonable to assume that the 1910 and 1922 amendments were similarly inspired.

The enlightened judgment of the community of civilized states and nations is that a defendant's poverty shall not keep him from securing a full record, particularly in a serious criminal case.

The Administrative Office of the United States Courts has recently prepared a memorandum summarizing the answers to a questionnaire sent to the Chief Justices of the several States concerning their systems of court reporting.[1] It concludes:

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[1] The memorandum is entitled *Memorandum Concerning the Answers to the Questionnaire to State Chief Justices in regard to the Systems of Court Reporting in the States.*

"In most of the states the cost of reporting criminal cases of indigent defendants, including transcript if necessary, is paid by the public upon the direction of the court."

A number of the State statutes on the subject are cited in an interesting review in the opinion in *State* v. *Morgan*, 152, Ore. 1, 7, 8. 48 P. (2d) 766, 769 (1935).[1] And, as we have seen, State courts have asserted their inherent power—as did this Court in the *Gildersleeve* case—thus to aid a pauper. *Supra*, p. 24, n. 1.

As this Court knows, in 1941 the Judicial Conference of Senior Circuit Court Judges of the United States, after long study, recommended legislation to correct an inadequate system of court reporting in the federal courts, with provision for furnishing transcripts to indigent criminal defendants at public expense. See REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, pp. 7-8 (1941).[2] See sec. 5a(e) of the proposed bill and the comments in the letter of transmittal from Judge John J. Parker to the Director, Administrative Office of United States Courts, dated October 24, 1941. And the American Law Institute, in its proposed Code of Criminal Procedure, provides for furnishing the transcript in a criminal case without charge. See sections 447 and 450 of the official draft, American Law Institute, CODE OF CRIMINAL PROCEDURE (1930).

In most of the more advanced nations of the world it is provided that the record of the evidence in a criminal case is made up at public expense by officers of the court, so that the defendant is not compelled—as he has been in the United

[1] Some of the statutes are limited to cases involving certain of the more serious crimes.

[2] It is understood that similar action was taken at the 1942 Conference.

States federal courts—in effect to buy a record from the reporter in order to secure appellate review. And in some countries it is also provided that additional copies of the transcript will be furnished to the defendant for his own convenience without cost to him, at least where he is a pauper.

The English *Criminal Appeal Act, 1907*, 7 Edw. VII, c. 23, 4 HALSBURY'S STATUTES OF ENGLAND 734 (1929) at section 16(1), provides for the appointment of an official court reporter who makes a transcript of the evidence in all cases in which an appeal lies. The Act provides that on appeal a transcript shall be made at the direction of the Registrar for the use of the Court of Criminal Appeal or any judge thereof. The cost of taking the notes and the cost of transcripts made at the request of the Registrar are paid "out of moneys provided by Parliament". *Ibid*, sec. 16(3). Thus, a transcript of the evidence is furnished for the court when an appeal is taken whether or not the appellant is a pauper. The English *Criminal Appeal Rules, 1908*,[1] promulgated under the *Criminal Appeal Act, 1907*, provide in Rule 5 that additional transcripts furnished to the parties for their convenience must be paid for; but if the defendant is a poor person the court may, under Rule 39(c), order that such a transcript be furnished to him without charge. *Rex* v. *Davis*, 11 Cr. App. Rep. 52 (Ct. Cr. App., 1914).

In Ireland an official reporter is present at the trial of every person tried on an indictment and takes a shorthand note of the proceedings. The appeal is heard on the transcript of these notes and the appellant may have a copy upon paying the proper fee. If the appellant is unable to pay for a copy of the transcript the court on application may direct that a copy thereof be issued to him free of.

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[1] See ARCHBOLD'S PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES (30th ed., Ross and Turner, 1938), 309, 317.

charge under Rule 35 of the Irish Court of Criminal Appeal. Sandes, CRIMINAL PRACTICE PROCEDURE AND EVIDENCE IN EIRE (2d ed., 1939) 182.

In South Africa provision is made by rule of court for including a transcript of the evidence in the record on the trial of a criminal defendant, apparently without prepayment of the cost of such transcript by the accused. I Gardiner and Lansdoun, SOUTH AFRICA CRIMINAL LAW AND PROCEDURE (4th ed., 1939) 701.

The rules of the British courts in Shanghai provided at Rule 21(b):

> "Where a legal practitioner is assigned to an appellant, copies of any documents or exhibits which they or he may request the Registrar to supply shall, without charge, be supplied unless the Registrar thinks that they are not necessary for the purpose of the appeal."

Rule 11 provided that the record on appeal should contain the judge's notes and the depositions taken at the preliminary inquiry, if any. *The China (Criminal Appeal) Rules of Court*, 1914; see W. B. Kennett, CHINA RULES OF COURT (1910) 237, 240.

In South Australia, section 3 (2) of the *Poor Persons Legal Assistance Act, 1936*, 3 Edw. VII, c. 38; 20 & 21 Geo. V, c. 32; 6 Bean and Cartledge, SOUTH AUSTRALIAN STATUTES, (1937) 641, provides:

> "The Attorney-General may by a special or general direction require any officer in the employment of the State to supply, free of cost or such fees as the Attorney-General fixes, to the Society or any practitioner acting for a person a certified or other copy of any document in the possession, custody or control of that officer, if that copy is required in connection with any legal professional work carried out for a poor person.
>
> "In this subsection 'document' includes any transcript or notes of the evidence or arguments in any court."

In India the Magistrate or Session's Judge before whom the accused is tried in the first instance is charged with the duty of taking down the evidence or of dictating it in open court. This duty must be performed in every case and no provision is made for the prepayment of any cost by the accused. The notes become a part of the record available upon appeal. Hari Rao and Krishnaswami Aiyar, CODE OF CRIMINAL PROCEDURE, (2d ed., 1939) 1191 et seq.

In Canada no specific relief for indigent criminal defendants has been found. Apparently, the general rule is that the appellant must bear the cost of transcribing the stenographer's notes in order to make up a record on appeal. *Rifken* v. *Rex*, 40 Que. K. B. 537 (1926). But *quaere* whether relief may not be available in a case such as this petitioner's under the procedure which provides that the Minister of Justice[1] may direct that a copy of the transcript of the evidence be furnished him in appropriate cases, REVISED STATUTES OF CANADA (1927), c. 36 sec. 1021 (4), and further that the Minister of Justice may refer a proper case—presumably including his file on the case—to the appellate court where it is reviewed as though the accused had appealed to that court, REVISED STATUTES OF CANADA (1927) c. 36, secs. 1021-1022. See Crankshaw, CRIMINAL CODE OF CANADA (6th ed., 1935) secs. 1021-1022; SNOW, CRIMINAL CODE (5th ed., 1939) secs. 1021-1022.

In the Republic of China provision is made for a clerk who incorporates notes of the evidence into the record. In the absence of the clerk, this function is performed by the Public Officer who examines the witnesses. This record is made in each case with no provision for prepayment of any costs by the accused. CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CHINA, article 41 et seq. (1936).[2]

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[1] The Minister of Justice acts for the Crown in this connection.

[2] This Code is found in English translation, by the Legal Department of the Shanghai Municipal Council, in the Library of Congress.

In Russia, a secretary of the court, paid by the state takes minutes of the trial proceedings and evidence which go into the record on appeal; the Soviet code provides generally for assessment of costs, except that in connection with the trial of a poor person, the total expense of which is borne by the state. Zelitch, SOVIET ADMINISTRATION OF CRIMINAL LAW, pp. 213, 228 (1931).

Counsel regret their inability to ascertain the exact practice and procedure in other nations. Translations of the criminal procedural codes do not appear available nor have we found satisfactory secondary sources in print. We have, however, consulted with Dr. Vladimir Gsovski, Foreign Law Librarian of the Library of Congress, who is understood to have studied law in the principal Continental countries. He informs us that generally on the Continent the evidence, or pertinent portions, is recorded by a court official as it is given, that his salary is paid by the state, and that the record he makes goes to the appellate tribunal without cost to the defendant. In Dr. Gsovski's discussion with us he made rough oral translations from the codes of the Russian Soviet Federal Socialist Republic, Germany, France and Italy. Moreover, in France, at least, each defendant is apparently furnished without charge with one additional copy of the transcript for his own use whether or not he is a pauper. *Code d'Instruction Criminelle* (1940) Art. 305. Compare the provision for poor persons in the Brazil code. *Código do Processo Penal* (1942) art. 806 § 1.

Thus it can be asserted with some confidence that, among the principal nations, only in the United States courts does one encounter a system which denies a full record to a criminal defendant because he is too poor to buy one.[1]

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[1] There is some reason to believe that, despite the Comptroller General and the current of lower court decisions which have followed the *Fair* case, some of the federal officials have insisted upon protecting paupers. For instance, we understand that in the United States Court for the District

The evil in such a system is one which students of the law have long condemned. Lindsay, *Necessity for a Court of Criminal Appeal*, REPORT OF NEW YORK BAR ASSOCIATION, VOL. 33, pp. 34, 39 (1910); Smith, JUSTICE AND THE POOR, p. 8 (Bull. 13, Carnegie Found. Advance. Teach., 1919); Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice*, 10 JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 170, 173 (1919); Millar, *The Modernization of Criminal Procedure*, 11 JOURNAL OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY 344, 366 (1920); Orfield, *Appeals by Indigent Criminals*, 3 UNI. OF PITTSBURGH LAW REVIEW 1 (1936). It is extraordinary that in the military judicial process there exists no such evil as that which still plagues the federal courts of civilian justice. Dean Wigmore noted the fact long ago:

> "In Federal military justice every record of every case goes up to at least one higher authority; and all records of general courts-martial go up two stages • • • Every convicted man thus obtains an appellate scrutiny; and this he obtains without any cost, paying no counsel fee and no transcription expense.
>
> "This is an ideal of which civilian justice has been dreaming ever since Magna Carta. Complete justice to the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. And it costs not a cent • • •

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of Columbia the district attorney has arranged to have a reporter take the testimony in all capital cases and that two copies of a transcript are always prepared, whether or not an appeal is taken. One copy is furnished to the judge and one to the district attorney, but if there is an appeal one of the copies, and sometimes both, are certified. The entire cost is paid by the Government. Similar practices probably exist in some other districts. As a matter of fact, after the decision of the Comptroller of the Treasury in 26 Corp. Dec. 362 (1919), *supra*, p. 43, the Department of Justice advised a district attorney, whose request for permission to print a pauper's record had led to the Comptroller's ruling, that he could pay for the printing, despite that ruling, by having the matter specially taxed against the Government under 28 U. S. C. A. § 577.

"Here is an object lesson for civilian justice." See *Some Lessons for Civilian Justice to be Learned from Military Justice, op. cit., supra*, at p. 173.

The recent case of the Nazi saboteurs strikingly illustrates Dean Wigmore's statement.

Our own military law, then, as well as the civilian law of other nations and of most of the States, and the opinion of the judiciary, the bar, and the academicians, all show an enlightened judgment which in the United States courts has not been reflected in practice. A two page decision by a District Court in 1916 has been followed uncritically. *United States* v. *Fair, supra*, pp. 37, 46. This Court's and many other courts' decisions asserting an inherent power in the judiciary to provide fair treatment of the poor have been ignored. *Supra*, pp. 20-34. The effort of Congress to assure "that poor defendants' rights in criminal cases may be fully conserved", *supra*, p. 45, and that the United States keep pace with a humane and enlightened judgment, *supra*, pp. 36, 56, has been defeated.

It is submitted that this Court should, in reversing the decision below, reestablish the power to protect the indigent.

Respectfully submitted,

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Counsel for Petitioner.

APPENDIX A.

Letter from Counsel Who Represented Petitioner at His Trial and in the Circuit Court of Appeals.

"PHILIP G. ALSTON
Attorney at Law
Texarkana, Arkansas
September 21 1942

"Mr. Howard C. Westwood
% Covington, Burling, Rublee,
Acheson and Shorb
Attorneys at Law
Union Trust Building
Washington, D. C.

In re: J. W. Miller, petitioner, vs. United States, Supreme Court of the United States, October Term 1942,—No. 76.

"Dear Mr. Westwood:

"Your interesting letter has been received by me, and I am hastening to give the matter attention. I agree with you that the point involved is an extremely important one, and one which I expect the Supreme Court will definitely pass upon in the Miller case.

"As to whether or not Miller properly raised the question in the lower court, I will state to you in a general way what took place, and then will endeavor to answer your specific questions.

"As soon as Miller was convicted we filed a notice of appeal, in which we set up several grounds, among them that the verdict of the jury was contrary to the evidence. When we got ready to perfect the appeal Mr. Woods and I made inquiry of the District Attorney and the court reporter as to the possibility of obtaining the entire transcript of the testimony, so that every question could be raised on appeal. From our conversations with these officials we

formed the opinion that Miller had no right to have all of the testimony transcribed at Government expense, and we advised Miller that unless he was in a position to pay the court reporter for preparing this transcript he would be unable to raise any questions on his appeal which would require the transcribing of the testimony. Mr. Miller thereupon informed us that he thought he could get up about $100.00. I contacted the court reporter and informed him of this fact and made an arrangement with him whereby he was to transcribe a sufficient amount of the testimony to raise the question as to whether or not Miller was a 'parent' within the meaning of the exception contained in the Lindbergh law, for the sum of $50.00, which sum was also to compensate him for his work during the eight days that the trial lasted, the other $50.00, with Miller's full knowledge and consent, was used by Mr. Woods and myself as an attorney's fee.

"The court reporter told us that it would cost several hundred dollars to transcribe all of the testimony in the case, and as such a sum was obviously out of Miller's reach, no effort was made to have the reporter transcribe it all.

"It was pointed out to Miller that under the law as we understood it, he was not entitled to have a transcript of the testimony prepared for him at Government expense, and for that reason his appeal would be limited to the one point above mentioned. Mr. Miller never made any formal motion or request to the District Court for a transcript of all of the testimony, and his Pauper's Oath and the order thereon were couched in general terms.

"Passing now to some of your specific questions:

"1. I do not have an extra copy of the brief filed by me in the Miller case.

"2. To the best of my recollection, the question as to whether or not the evidence in the case sustained the verdict was not referred to except in the original notice of appeal.

"I do not know what Miller wrote Judge Lemley on April 18, 1941, and I do not know whether or not Judge Lemley would be inclined to furnish copy of this letter, but I will ask his Secretary about it today. Straining my recollection,

I recall that Miller said in this letter that the evidence was very weak, and that he did not believe that a case of kidnapping had been proved against him.

"3. Mr. Miller, directly after the trial, wanted to appeal on all possible grounds, and abandoned that position only when it was explained to him that we felt that this was impossible. After he elected to start the serving of his sentence pending the disposition of his appeal, he wrote me a number of letters in which he urged me to insert in my brief 'affidavits' that he was innocent. His letters also urged that the question of the insufficiency of the evidence be argued in the brief. As he has sent you the letters which I wrote him, I need not take up time to explain what I wrote him.

"4. There is nothing in writing evidencing any of the discussions between Mr. Woods and myself on the one hand and the District Attorney and the Court Reporter on the other, concerning the obtaining of a transcript of the testimony. All of the conversations were oral, and I feel have been fully set forth in the preceding paragraphs.

"5. Mr. Williams, the Official Court Reporter, was not paid by the Government for any of his work, but was paid $50.00 of the $100.00 which Miller raised. As far as Mr. Williams' status is concerned, he serves as the Official Court Reporter, but as to whether or not there is any court order making him such, I do not know. He has never been paid, as far as I know, by the Government for acting as reporter in any trial, and I know he was not paid by the Government for reporting this trial. Had the District Attorney desired a full copy of the transcript he would have to had paid for it.

"Trusting that this letter will answer at least some of the questions asked in your letter, I remain,

Very truly yours,

(Signed) PHIL G. ALSTON,
Attorney at Law.

PGA/ehl.

APPENDIX B.

Letters from Petitioner to the Trial Judge, Copies of Which Have Been Furnished by the Judge's Secretary, at the Judge's Direction.

"Thur. 6 (Feb. 6, 1941).

"Miller Co. Jail

"Honorable Juge:

"Dear Sir: I wonder if you would be so kind to consider this letter. It is a long time to be away from my children, for I think more of them than I do of myself. I wanted to give them a eguention, and if I wer guilty of the crime it would be diferent. I would not ask anything. I wish you would grant me a cut so I could have a chance to do something for them, as I would be so old and broke down I couldnt help them. I wanted to explain to you but I was afraid it would make you *mad*.

"Juge, if you would give me som kind of clemsey, I say give me 20 years on prole, or any kind you see fit, so if I made a crooked move I would have to do it.

"Please consider *this*, I would give my life to be able to give those little children an advantage of life.

"If I am guilty of this crime I don it in ignorance. So please forgive me and please dont git mad for I wanted to explain.

"Yours sencear,

(Signed) J. W. Miller,

Jessie William Miller.

* * *

"May 16th, 1941,
Hope, Ark.

"From: J. W. Miller
58098

"To: Hon. Harry J. Lemley

"Special Purpose

"Your Honor, I beg your pardon for bothern you, however, it means to much to me. I want to explain a few

things to you. If you remember the testimony in my trial, the most importent goverment witness in my tryal was Dr. Hendrix of DeQueen, Ark., an who admited the reason he dident doctor the girl when she arived was becose he knew she an her husban had trouble and was afraid he, Will Garner, would use a .45 on him. Therefore he called in the law, an that was the point of which she stated to us in her letter which was shown by Mr. Raymon Russell an his son. Mrs. Hendrix testified the girl had such pretty brown curley hair, of which the girl never in her life had brown curley hair. And if she did have a fractured arm how could I be responsible for it, after she hitch hiked 200 miles, of which lots of people gets their car and life taken away from them on the highway, an which was shown by respectable people, Mr. McClure and Mr. Fields who seen the girl last an talked to her just before she got in the car, within 150 feet of our house, and left the littel boy with Mr. Fields to keep until we came in. An she was carrying a bundle of close on one arm an the baby on the other, an was not beat up or hurt in any way when she left.

"An it was shown by Mr. Bookout an Mr. Rusell, an son, an Mrs. Rusell, an Mr. Fields, an Mr. McClure, she went to town and was seen at diferent places over town, an Mrs. Russell testimony showed she talked to the girl 15 blocks from our house and she told her the reason she dident stay with her man was he wasent what she thought he was. An she was lookin for work at the time an I wer not around. Mr. Bookout testimony was, he talked to her in the corthouse at Sherman, Tex. an she was going to the doctor for medicine an I wer not around, an he had seen her diferent times over town an if I wer so cruel to her, why would I let her go over town with broken arm an skined head. I could have had 50 or more people ho had seen her going about like any one else, if the goverment would have allowed it. An at McKinney, Tex. where we first stopped, Mr. Hartline and wife testified she was treated like the rest of the famley, an she never said anything about any trouble to them an never even ask them to right a letter for her. An the both of them and wife and I went to town an left her with the children an never returned untill late at night. She could have left them. An she wasent mistreated then.

"Mr. B. R. Harless and C. C. Harless, of Snyder, testimony for the goverment, stated, he heard me whipen her 150 yards an she was able to work that morning, an she wasent crying an she came out of the house and stood by the dore, an all he seen was her sore hands. An C. C. Harless claimed he heard her an I wer whipen her 150 yds and he was in bed an it woke him up, with the dores closed, and still she worked that morning. You know a mule or a man couldent have worked or anything else, beaten up like that. An said they told the law an the law wouldent do anything. You know it is a very pore law and a pore man who wouldent have don something about it, but amitted their was pea hulls in the house after we left, and the racket he heard sound like beeting a matress. An beeting a human wouldent sound like beeting a matress. We wer beeting peas out, while the due was on the cotton.

"If I had a crimnal enfent I would have had someone or ones who would have been with me all the time, besides my family. The reason of their testimony was, becose he was mad, for the reason we dident finih pickin his cotton, an he could get a hundred or mor dollars out of the goverment.

"Now at Snyder, Tex. at the time I wer arested. I wer in jail and the girl wer taken before the County atorney an sherif force an in his office an never told them about bein beaten up and fooled away from home, an the doctor examined her very close and dident find anything, broozes or whelps, an she could told them, an I were not around, an she or any girl of 17 knows what the law ar for. An the doctor said she had polegra an unbalance and turned me aloose. An the scar on her hip was when she hoped of the car and slid down in the grass an which ar very poison, an her system bein in bad condshion, made a sore an which the M. D. stated. I cannot understand why those people couldn't find out of anything being rong.

"Now back to Sherman, Tex. when I wer arested an in jail an the health oficer came out an talked with her. An when I wer arested Joe Hall an R. C. Slagle came out. Joe Hall testimony was she had a bloody rag on her head and the meat was stomped out to the bone in the bottom of her feet. An she was up walkin around with shoes

on the next day. He also said R. C. Slagle gave me a cussin in my house, an he was the district attorney at the time. The girl said she had sun sores on her ankles and a little place on her head—didnt say she had a bloody rag on her head, an said she never heard any cussin their. An the sore on her head was from a risen an about the size of a quarter. R. C. Slagle never maid a statement like that; he said we looked like por transent people, an the girl was sittin down in the floor or box and got up and walked around and had som ole sores on her ankles. An she an the baby was very dirty and he said she was in the house. An Hell said she werent when they came up. She said she was. An Mr. R. C. Slagle said she was: And the reason he dident prosecute me there wasent any one who would apear. An if so why dident she or ho had it don? proscute me? An why did she signa sworn statement? I never had mistreated her in her life. An I were not present when she don it. The reason those woodcutters don what they did, was I had contracted a strip of timber an they wanted it an got it. An why dident they have them before the Cort? An why dident they prosecute me? Becose it wasent so an they knew it. An they had got the timber.

"I say it is a very pore mother who would stand for such to hapen to her own child. An a very poor law who couldent find anything rong; Yor Honor, if I had a crimnal intent why should I let her roam around anywher, beet or bunged up, like that? If I had knew it would have bin like this, I could have had 50 more witness to shoed more as to my part. However, I thought right would win.

"An Mr. H. T. Arterberry, F. B. I., couldnt find anything rong when investigated us, threw the chief of pleace an his self, an he said when he came out to envestagate, she wasent at home; an he went away an return an talked to the girl when she came in. An she throwed a hissey an said Will Garner, the one ho was cosin the trouble, an raved about him doing so, an I wer not present. I feel like the FBI could found out if there wer anything rong, an he said he dident find out, and left.

"I have gave the testimony on both sides as close as possible. Mr. Fred Cotton ho testified she was treated

like the rest of us, an we went to town diferent times an left her an the children at his place. An she got watter at the back of his house before an after dark. An she never said anything to them about any trouble. An he never seen anything rong or heard any whippen or cussin) (So please reed this very closley and consider it the same, an I feel like you will com to the conclusin, I am an inson man.

"Your Honor, I know I could have lost my life over this, an if I wer guilty of such crime I would think you had gave me a birthday present, an wouldn't have nerve enough to apeal to you for help. I realize I am not very brite, but I do no when I do the rong thing, and the reason I did go after the child was for the love of her mother, an the respect of the girl. I relize it wouldent looked so good for you to have taken the case out of the Juriors hands and decided it yourself. An if you rember durin the trial of the comotion among the witness in the hall, which J. O. Garner, plantif brothr, caused, an he was on the Jurior list of the year, an I feel like the Juriors did not go by the evidence in the case. So please consider this very close an give me the benefit of the dout, as I am an inosent man, an please let me hear from you. Hopin you will take steps to help me.

"Very sencear, please help me,

(signed) J. W. Miller,
Box PMB 58098
Leavenworth, Kansas

APPENDIX C.

28 U. S. C. A. §§ 832-836—The Act of 1892 as Amended

The *in forma pauperis* statute, 28 U. S. C. A. §§ 832-836, was originally adopted as the Act of July 20, 1892, c. 209, 27 Stat. 252. Section 1 was amended by the Act of June 25, 1910, c. 432, 36 Stat. 866, and was further amended by the Act of June 27, 1922, c. 246, 42 Stat. 666. The following shows the Act as adopted with successive changes

therein. The Act as adopted in 1892 appears in light face roman type. The additions made by the 1910 amendment are shown in italics, and the deletions made by that amendment are shown by single lines stricken through words deleted. The additions made by the 1922 amendment are shown in **bold face** type, and deletions by double lines stricken through words deleted.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any citizen of the United States entitled to commence ~~or defend~~ any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any ~~such~~ suit or action, *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith*, without being required to prepay fees or costs *or for the printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action ~~which he is about to commence~~ *or of such writ of error or appeal*, or to give security for the same, and that he believes *that* he is entitled to the redress he seeks ~~by~~ **in** such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action, *or appeal*: **Provided, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.**

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs

by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, That the United States shall not be liable for any of the costs thus incurred."